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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 342. 72.

JOHN M. AVERY, CHARLES C. COBB, AND H. I. PHILLIPS, PLAINTIFFS IN ERROR,

vs.

I. POPPER AND E. POPPER, COMPOSING THE FIRM OF I. POPPER & BROTHER, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

FILED MAY 23, 1890.

(17,695.)

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* * * * * * *

1-69 *First Amended Consolidated Pleading of Plaintiffs.*

October 25, 1897.

In District Court, Hunt County, Texas, October Term, 1897.

I. POPPER & BRO. and R. R. NEYLAND & Co.
vs.
J. H. COOKE ET AL. } Nos. 3406 & 3407.

70 The plaintiffs, by leave of the court, file this their first amended consolidated pleading, amending their original pleading, filed herein — day of January, 1894, and show that I. Popper & Bro. and R. R. Neyland, plaintiffs, in obedience to the orders of this court, heretofore made, to the effect that cause No. 3406 and cause No. 3407 be consolidated, and that the plaintiffs in said suits file herein a consolidated pleading, setting forth in a repleader their causes of action, and for such repleader they say that plaintiffs I. Popper & Bro. *is* a firm composed of I. Popper and E. Popper and are both resident citizens of Hunt county, Texas, and that the defendants herein, J. H. Cooke and M. E. Cooke, are resident citizens of Hunt county, Texas, and that the defendant John M. Avery is a resident citizen of Dallas county, Texas. Plaintiffs show that heretofore, to wit, on May 26th, 1891, the defendants J. H. Cooke and M. E. Cooke made, executed, and delivered to T. H. King their joint and several promissory note, in writing, of that date, whereby they and each of them became liable and promised to pay T. H. King, at Greenville, Texas, on November 1st after date (being November 1st, 1891), the sum of $1,940.00, with interest thereon from June 1st, 1891, at 12 per cent. per annum, and 10 per cent. attorney's fees if placed in the hands of an attorney for collection; that in order to secure the payment of said note, interest, and attorney's fees the said J. H. and M. E. Cooke did, on May 26th, 1891, make, execute, and deliver to the said T. H. King a certain chattel mortgage in form of a conveyance in trust to said King, whereby they gave a lien upon and conveyed to the said King, among other property in said instrument conveyed, the following-described property, to wit: 50 cows, with their spring calves, being their calves of the spring of 1891. All of said cattle are branded Cook on the left side and O. K. on the left hip, said cattle consisting of 50 cows and their spring calves, being now 17 head of two-year old past steers and 33 head of two-year-old past heifers. There was also included in said mortgage or conveyance one bay mare (then a colt), two years old past at time of levy, branded J. 6; one gray horse (then a colt), two years old past at time of levy, branded J. 6; one black mule (then a colt), two years old past at time of levy, branded J. 6. The said cattle
71 are now of the reasonable market value of $15.00 per head, and the said horses and mare are now of the reasonable

market value of $50 per head, and the said two mules are now of the reasonable market value of $75 per head, and have been at all times and places since the said levy, all of which said calves—that is, the 17 steers and the 33 heifers above mentioned, being described in said chattel mortgage as the spring calves of the said 50 cows—were not branded at the time of the execution of said mortgage, but were to be and were so afterwards branded in the brands as above alleged; that said instrument was given, to quote its own language, "for the purpose of securing a note this day given by us (J. H. and M. E. Cooke) to said T. H. King for the sum of nineteen hundred and forty dollars, payable the 1st day of November, 1891, and bearing 12 per cent. interest from June 1st, 1891, and 10 per cent. attorney's fees, if collected by law," the same being the note hereinabove described upon which this suit is based. Plaintiffs show further that on or about April 10th or 11th, 1892 (it being uncertain which of the dates the transfer bears) T. H. King transferred to these plaintiffs said note as follows—that is to say, he transferred to I. Popper & Bro. an interest of $775.00 in said note, and interest thereon, at the rate expressed in said note, from the date thereof, to wit, May 26th, 1891, and all the balance of said note, including the balance of principal and interest thereon, as expressed in said note, after deducting the interest of I. Popper & Bro., was by said King at said time transferred to R. R. Neyland, under the name and style of R. R. Neyland & Company, the said R. R. Neyland being then engaged in a business conducted by him under the said style. The transfer so made by the said King to these plaintiffs was in writing endorsed on the back of said note and is as follows, to wit:

"Seven hundred and seventy-five dollars and interest from date of said note transferred to I. Popper & Bro. and the balance of the note transferred to R. R. Neyland & Company, both transfers being made without recourse on me, in law or equity, this April (10th or 11th, it is not certain which), 1892.

"(Signed) T. H. KING."

That the said I. Popper & Bro. and the said R. R. Neyland &
72 Company now own their respective interests in said note, as shown by said transfer, and, although long past due, the said defendants have failed and refused to pay the same or any part thereof, save and except the sum of $300.00 paid R. R. Neyland March 29th, 1893, which said $300.00 so paid is a credit on the interest of the said R. R. Neyland in said note.

Plaintiffs show that the obligations of the said J. H. and M. E. Cooke, as expressed in the note sued on, as to the payment of attorney's fees herein claimed, are as follows, to wit: that they promised jointly and severally to pay, as hereinabove alleged, the $1,940.00. Then the language proceeds, "with interest from June 1st, 1891, at 12 per cent. per annum, negotiable and payable at Greenville, Texas, and 10 per cent. attorney's fees if placed in the hands of an attorney for collection;" and the said mortgage, which bears same date as said note, in describing the said indebtedness for the security of which it was given, refers to it as 10 per cent. attorney's fees if col-

lected by law, all of which said obligations meant 10 per cent. attorney's fees on the entire indebtedness, principal and interest due, such being the only reasonable construction thereof.

Plaintiffs further show that they have placed said note and each their respective interest therein in the hands of their attorneys for collection, and that in order to collect the same they have been forced to resort to law and its processes, as is here shown by the prosecution of this suit. Plaintiffs show that the defendant John M. Avery is asserting and claiming some title to or interest in said property, and that at the time of the institution of these suits, on June 29th, 1893, he was in possession of all of same in Hunt county, Texas, and that these plaintiffs did in their said suits respectively file the necessary affidavits and bonds and procure the issuance of writs of sequestration, which were by the sheriff of Hunt county, Texas, on June 29th, 1893, acting by and through one of his deputies, executed by levying upon and taking the above-described property;

73 and afterwards all of said property so seized was redelivered and released by said officer to the defendant John M. Avery upon his executing and delivering to said officer his replevy bond (one under each writ and levy), with Chas. C. Cobb and H. I. Phillips his sureties in said replevy bonds, which said bonds were by said officer returned to this court and are now on file amongst the papers in these consolidated cases.

Plaintiffs show that in their original petition, affidavits, and bonds for sequestration that the name of the defendant John M. Avery was erroneously alleged to be J. W. Avery, but that the defendant so alleged to be J. W. Avery and the defendant in whose possession said property was found by said officer and who replevied the same and has answered herein is one and the same person. Plaintiffs show that after said property was so delivered to John M. Avery by said officer that the said Avery moved the same out of Hunt county, and has converted the same to his use; that he so removed all of said property out of Hunt county and into other counties, and sold and disposed of the same within a short time thereafter, and has none of the same now, and it is wholly impossible for him or either of his sureties to produce said property or any part thereof in satisfaction of any judgment that may be rendered against them therein; that at the time of the said seizure of said property under execution and at the time of the sale thereof, at the time of the levy by these plaintiffs under sequestration and their replevy by defendant, and at all times and places since, the said property was of the reasonable market value as hereinbefore named; that these plaintiffs claimed by virtue of their mortgage a lien upon the property so sequestrated and involved herein, but should the court hold that the said instrument did not cover any specific number of cattle or other stock, then they show that they had the right to elect and did elect to claim a lien upon the property involved herein. Wherefore they pray for judgment against J. H. Cooke for their debt, interest, and attorney's fees, and for a foreclosure of their said mortgage and lien on the before-described property as to all the defendants, and for judgment against Avery

and his sureties on replevin bonds, Cobb and Phillips, costs of suit, and general and special relief.

CRADDOCK & LOONEY,
Att'ys for Pl'ffs.

74 Endorsements: I. Popper & Bro. and R. R. Neyland & Co. *vs.* J. H. Cooke *et al.* Nos. 3406 and 3407. 1st amended consolidated pleading of plaintiffs. Filed October 25th, 1897. O. S. Moore, clerk.

Second Amended Original Answer of J. M. Avery.

Filed January 12, 1897; refiled October 26th, 1897.

In District Court, Hunt County, January Term, 1897.

I. POPPER & BRO. and R. R. NEYLAND & Co. *vs.* J. H. COOKE ET AL. } Nos. 3406 and 3407. Consolidated Case.

Now comes the defendant John M. Avery in the above case and, not waiving his plea to the jurisdiction of this court herein filed, but expressly reserving all his rights under said plea, and by leave of the court first obtained, files this his second amended original answer herein in lieu of his answer filed herein on January 17th, 1894, and in answer to the repleader or amended petition and 1st amendment of plaintiffs to their consolidated pleading filed herein he pleads as follows:

1. He excepts to the said petition because it appears therefrom that this defendant resides in Dallas county and not in Hunt county, and so resided in Dallas county at the time of the institution of these two suits and at the time of the filing of said amended petition and at all other times between said dates, and no facts are alleged which show that the district court of Hunt county has any jurisdiction over him in this case or has any right to retain and try this case against this defendant in Hunt county, but it does appear from said petition that this court has no such right. Wherefore he prays judgment, &c.

2. And should the foregoing exceptions be overruled, then this defendant excepts to said petition because the same is insufficient in law and shows no cause of action. Wherefore he prays judgment, &c.

3. This defendant specially excepts to said petition because
75 it appears therefrom that plaintiffs' cause of action is founded on one promissory note, payable to one T. H. King, and the said T. H. King, after the making and delivery thereof to him, by endorsement thereon transferred a partial interest in said note to each of the plaintiffs herein separately, and neither of said plaintiffs own or hold the whole of said note, and each of said plaintiffs have brought suit separately on their alleged interest without making the other plaintiffs parties thereto, and according to law

such transfers cannot be made and such suits brought, and plaintiffs cannot maintain this suit based thereon. Wherefore he prays judgment, &c.

4. This defendant specially excepts to said petition because the mortgage sued on is sought to be foreclosed only on a part of the property covered by it, and only a part of the property is sequestered herein. Wherefore he prays judgment, &c.

5. This defendant specially excepts to so much of said petition as alleges that, after the property mentioned therein was sequestered and replevied and delivered to this defendant, he drove the same out of Hunt county and converted the same to his own use, because (1) this is a new and distinct cause of action against this defendant alone, arising after the institution of this suit, and because (2) such cause of action for damages against this defendant alone cannot be joined in this suit with the cause of action on the note and mortgage sued on, and for foreclosure of said mortgage and sequestration of the property. Wherefore he prays judgment, &c.

6. This defendant specially excepts to said petition because the description of the property therein is too vague, indefinite, and uncertain, and said description is not sufficient to identify said property and distinguish it from property of a like kind, and said petition affords no means of identification or distinguishing said animals from other animals, and does not state where said animals were located and in whose possession they were, or give any other sufficient description of them. Wherefore he prays judgment, &c.

76 7. This defendant specially excepts to the allegations in said petition as to attorney's fees because they are too vague, indefinite, and uncertain as to the way and amount on which said fees are to be collected and furnishes no basis for calculation on which to base a judgment for same. Wherefore he prays judgment, etc.

COBB & AVERY,
Att'ys for John M. Avery.

8. Should the above and foregoing exceptions be overruled, then, in answer to said petition, this defendant denies all and singular the allegations in said petition and demands strict proof thereof; and of this he puts himself upon the country.

9. And for further answer to said petition the defendant says that plaintiffs' cause of action is based upon a promissory note, described in said petition, payable to T. H. King or order, which said note was negotiable, and after its making and delivery to said T. H. King he transferred only a partial interest therein to each of the plaintiffs herein by endorsement thereon, and each of the plaintiffs only own a partial interest in said note, and they cannot maintain this suit, which is based on a partial transfer and endorsements.

That in the circuit court of the United States for the northern district of Texas, at Dallas, on the 10th day of June, 1889, W. W. Avery recovered a judgment against J. H. Cooke and M. E. Cooke

for the sum of ($2,638.12½) two thousand six hundred and thirty-eight dollars and twelve and one half cents, with interest thereon from its date at the rate of eight per cent. per annum, and costs of suit; that from said judgment said J. H. Cooke and M. E. Cooke sued out a writ of error to the Supreme Court of the United States, giving a supersedeas writ of error bond, as required by law, with Wm. Hodges, O. F. Hail, and J. H. Johnston as sureties thereon; that on January 23rd, 1893, said judgment was by said Supreme Court in all things affirmed except as to damages and costs against M. E. Cooke; that on the — day of May, 1893, the mandate of said Supreme Court was duly issued and received and filed in the said United
77 States circuit court, and on June 5th, 1893, the said United States circuit court duly entered its judgment in accordance with said mandate, whereby it was adjudged by the said United States circuit court that the said W. W. Avery recover of the said J. H. Cooke and his said sureties on said bond, the sum of ($2,638.12½) two thousand six hundred and thirty-eight dollars and twelve and one-half cents, with interest thereon from June 10th, 1889, at eight per cent. per annum, and costs of suit; that on June 8th, 1893, an execution was issued from the said United States circuit court on said judgment and directed to the United States marshal for the northern district of Texas, and commanding him to make said sum of ($2,638.12½) two thousand six hundred and thirty-eight dollars and twelve and one-half cents, and said interest and costs, out of the property of the said J. H. Cooke and his said sureties, said J. H. Cooke being the defendant in said judgment and execution; that at said time, June 8th, 1893, and at the dates complained of in said petition, one P. B. Hunt was the duly appointed, qualified, and acting United States marshal for the northern district of Texas, and T. B. McMurray and A. McCampbell were his duly appointed, qualified, and acting deputy United States marshals, and said P. B. Hunt and said deputies were duly authorized to execute writs of execution and other process issuing from the said United States circuit court; that said writ of execution was placed in the hands of said P. B. Hunt, marshal as aforesaid, and if the property described in the petition of the plaintiffs was ever taken possession of by W. W. Avery or this defendant (which he denies), then this was done under and by virtue of a levy thereon made under said execution by the said United States marshal and his deputies, acting in their official capacity, and by due and legal sales thereunder made by the said marshal and his deputies, and a valid title to the said property passed to the said W. W. Avery thereby; and this defendant defends and justifies all his acts herein under the same; that at the time of said levy, seizure, and sale said property was the property of the said J. H. Cooke, who was defendant in said execution, and was the community property of
78 said J. H. Cooke and M. E. Cooke, and was not the separate property of M. E. Cooke, and was liable for the debts of said J. H. Cooke and subject to said execution against him, and said property was in possession of said J. H. Cooke, and a good title to it passed by said sale; that the damages claimed in this case against this defendant arose entirely out of the acts of said United States

marshal and his deputies, as aforesaid, and any liability for damages against this defendant arose and depend upon the validity of the said judgment and execution, and the acts of said marshal and his deputies under said execution, as aforesaid, and this defendant defends this case and justifies all his acts in this case under the same; that said J. H. Cooke and M. E. Cooke were at that time and are still insolvent; that if the property described in plaintiff's petition was ever transferred to M. E. Cooke, this was done or caused to be done by the said J. H. Cooke for the purpose and with the intent to hinder, delay, and defraud his creditors, one of whom was the said W. W. Avery, as aforesaid, and said transfers were void as against him and this defendant; that the plaintiffs herein claim to own separate interests in said note sued on by virtue of separate endorsements of said T. H. King to each of them, and claim that each of their said interests therein is secured by the same chattel mortgage and on the same property described in plaintiffs' petition; that on the 29th day of June, 1893, plaintiffs brought two separate suits in this court against the defendants in this case, asking for a judgment for the amount of their said interests and for the foreclosure of said chattel mortgage upon said property in each case; that each of the plaintiffs in their suits each sued out a separate writ of sequestration for said property, and each stating its value to be ($1,110.00) one thousand one hundred and ten dollars, and under each of said writs said property was in each case seized and taken from the possession of this defendant, and in each case this defendant was compelled to and did replevy said property by giving in each case a replevy bond, conditioned as required by law, in double the alleged value of said property in each case, with Chas. C. Cobb and H. I. Phillips as sureties; that if plaintiffs in said two cases
79 are allowed to prosecute their suits and recover judgment foreclosing said mortgage, this defendant will be compelled to account for and return said property in each of said cases or to pay the value thereof in each of said cases; that said two cases were brought in this form by plaintiffs for the purpose of embarrassing, hindering, and delaying said W. W. Avery in the collection of his said debt, and injure and oppress this defendant, and to compel this defendant to account for and pay the value of said property twice, and plaintiffs have not instituted and have not *bona fide* and diligently prosecuted their said suits against J. H. Cooke and M. E. Cooke within four years after their cause of action arose and accrued on their said note and mortgage, and their said cause of action against J. H. Cooke and M. E. Cooke and this defendant is barred by the statute of limitation of four years, which is hereby pleaded and specially relied on by this defendant. Wherefore defendant asks that this suit be dismissed as against him and for costs of suit, etc.

10. That in said chattel mortgage sued on the description of the property described in plaintiffs' petition is vague and indefinite and entirely insufficient to create any lien on said property; that at the time said chattel mortgage was given said J. H. Cooke and M. E. Cooke owned more and other horses, mules, colts, cows and calves, steers and heifers besides those described in said mortgage and

plaintiffs' petition, and said other stock were kept in the pasture with and on the range with and mingled with said property described in plaintiffs' petition, and said property was never delivered to said T. H. King and these plaintiffs or separated from said other stock, and nothing was ever done to separate and identify said property sued for, and said other stock had the same marks and brands and was of the same age, sex, and breeding as those sued for and described in said mortgage; that at the time the property sued for was seized and sold by the United States marshal in June, 1893, said property was mingled with other similar stock in the same marks and brands, age and sex owned by said J. H. and M. E. Cooke at the same time and place, and there was no way to separate,
80 identify, and ascertain the property covered by said mortgage and sued for herein; that said W. W. Avery was a judgment creditor of said J. H. Cooke, as alleged above, and said W. W. Avery claims said property by virtue of the judgment, execution, and sale thereof by the United States marshal, as above alleged; that by reason of the above facts said mortgage was and is inoperative and void as against W. W. Avery and this defendant.

11. That said chattel mortgage sued on herein in this case also included the following property to secure the debt therein mentioned and sued for in this case, and said other property is described in said mortgage as follows: One gray horse mule, five years old, right eye out, no brand; one gray mare mule, 15 h. h., branded 1 L on left shoulder, five years old; one black mare mule, branded I L, 15 h. h., five years old; one bay mare mule, 16 h. h., no brand, 3 years old; one bay horse mule, 7 years old, branded 5. 4., 16 h. h.; one black horse mule, branded H on left shoulder, 15 h. h., 8 years old; one mouse-colored mare mule, 15 h. h., 10 years old, no brand; # four bay horses, 14½ h. h., 4 years old; 2 brown mares, 14½ h. h.; four *four* sorrel mares, 14 h. h., four years old; two sorrel mares, 15 h. h., 7 years old; two sorrel mares, 13 h. h., 2 years old; 2 bay mares, 15 h. h., 7 years old, and one colt by one of the mares known as Parke's mares; two gray horse colts, 13½ h. h., 3 years old; one bay mare & mule colt, mare six years old; one bay mare, five years old, and colt; one bay mare, four years old; one Sam. Bass colt, two years old, bay; one black filly, two years old, known as Key filly; one bay Fanning filly and colt; one sorrel bay Bateman filly, 3 years old; one sorrel horse, three years old; # four two-year-old mules and one year old, branded cross on left jaw and hip. All between marked thus (#) branded J 6 on left shoulder. That at the time said mortgage was given the property therein described was owned by J. H. Cooke, and was substantially all the property he owned subject to execution, and he was then and has ever since remained insolvent and unable to pay his debts, of which he owed and still owes large amounts, and the property described in said mortgages was worth about twice as much as the indebtedness mentioned in
81 said mortgage, and all these facts were well known to said T. H. King and these plaintiffs at the time said mortgage was given and when they acquired the note sued on herein. At the time said mortgage was given, as aforesaid, the said T. H. King and these

plaintiffs, knowing all the facts above alleged, loaned J. H. and M. E. Cooke money as part of the consideration for said mortgage, the exact amount of which is unknown to this defendant, but is known to plaintiffs; that the property described in said mortgage was never delivered to said T. H. King or these plaintiffs, but remained in the possession of said J. H. and M. E. Cooke, and with the knowledge and consent of said T. H. King and plaintiffs said J. H. and M. E. Cooke have sold and disposed of a large part of the property described in said mortgage and appropriated and used the proceeds of such sales for their own use and benefit and not in payment of said indebtedness; the exact amount of such sales is unknown to this defendant, but is known to plaintiffs; that long prior to said mortgage and ever since its execution said W. W. Avery was and still is a judgment creditor of said J. H. Cooke, as above stated, and he claims the property sued for by virtue of said judgment, execution, and sale against J. H. Cooke, hereinbefore stated; that by reason of the above facts said mortgage was and is fraudulent and void as against W. W. Avery and this defendant.

12. That if it shall be found that said mortgage is valid and is a lien on the property described in plaintiffs' petition, and also on the other property described in said mortgage above set out, then this defendant says that W. W. Avery and this defendant, who claims under said W. W. Avery, also have a lien on and title to said property described in plaintiffs' petition by virtue of the judgment, execution, and sale thereof against J. H. Cooke, as hereinbefore alleged; and this defendant asks that said mortgage be foreclosed on all of said property described in it, and that said other property above set out be ordered to be sold first and the proceeds thereof applied in satisfaction of said plaintiffs' debt before the property described in plaintiffs' petition shall be sold or this defendant be required to return or pay for the property described in plaintiffs' petition.

82 13. That this defendant is informed and believes, and so avers, that part of the indebtedness sued for herein has been paid or property given to the plaintiffs in part payment thereof, but that the dates and amounts of such and the value of such property is unknown to the defendants and cannot be ascertained, but is well known to plaintiffs.

COBB & AVERY,
Attorneys for John M. Avery.

Endorsed: Nos. 3406 and 3407. I. Popper & Bro. and R. R. Neyland & Co. *vs.* J. H. Cooke *et al.* Second amended original answer of J. M. Avery. Filed Jan'y 12th, 1897. O. S. Moore, clerk. Refiled October 26, 1897. O. S. Moore, clerk.

First Amendment to First Supplemental Petition.

Filed October 25, 1897.

In the District Court of Hunt County, Texas, October Term, A. D. 1897.

I. POPPER & BRO. and R. R. NEYLAND & CO. *vs.* J. H. COOKE ET AL. } Nos. 3406 & 3407.

Now come plaintiffs and, leave of the court being first had and obtained, file this their first amended supplemental petition, amending their first supplemental petition filed herein January 17, 1894, and for such they say:

1. They deny all and singular the allegations contained in the *plaintiffs'* (?) amended answer filed herein and demand strict proof.

2. They say that they do not desire a double recovery in this case against the defendant and his sureties on the replevin bond, and here now show to the court that they have by a motion filed herein prayed this court to consolidate their causes to the end that justice only may be done, so that this court could in the consolidated cause protect the defendant and his sureties from a double recovery.

3. Plaintiffs show further that if there exists any imperfection of description of the property mortgaged, or if there was other property mortgaged at the time of and in the mortgage here
83 sought to be foreclosed, or if there now exists any other property upon which these plaintiffs could or would have the right to have a foreclosure in addition to the property upon which a foreclosure is sought in this suit, that this defendant would have no legal right to take advantage of such imperfect description or to ask the court to marshal such assets and securities or to set up fraud, as alleged by defendant, because plaintiffs show that the judgment under which defendant deraigns title and justifies is against J. H. Cooke and his sureties on a writ of error bond and is not against M. E. Cooke, and these plaintiffs show that the debt for which said suit was brought was a debt against J. H. Cooke or a community debt for which M. E. Cooke was not liable personally, and that all of said property that was included in the mortgage or instrument under which plaintiffs seek a foreclosure herein was at the time of the execution of said instrument and at the time of the levies alleged herein and is now the separate property of the said M. E. Cooke; that the same were bought and paid for with her own separate money and means, the said means being the proceeds of property inherited by M. E. Cooke from her father, together with the accumulation of interest thereon by loan of same to her husband; that she is the wife of the defendant J. H. Cooke and was when said instrument was executed. Plaintiffs show further that at the time of the execution of said instrument the identical property upon which foreclosure is sought in this case was gathered and

separated from any other property of similar description, and was separated and parted from any other stock of a like kind of cattle or horses, and was there checked out and definitely distinguished from any other property of a like kind or description.

4. Answering further, the plaintiffs say that if the description in this case should be held not to distinguish any particular property, they show that it was the intention of the parties to give a mortgage upon the property described or upon the number and class of property described in said mortgage, and that plaintiffs thereunder had the right to elect the cattle, horses, and stock upon which
84–87 to foreclose their mortgage, which fact they show that they have done, have brought suit and sequestered the property involved herein, and have elected the property involved herein; that said chattel mortgage was duly and legally registered in the chattel mortgage records of Hunt county, Texas; all of which defendant had due notice.

5. Plaintiffs show further that the property *that* was sold under execution, as alleged by defendant, and was bought in be defendant J. M. Avery, acting for W. W. Avery, and that no consideration of value was paid therefor, but the amount of the bid was credited upon the execution and judgment in favor of J. M. Avery against J. H. Cooke *et al.*, as alleged, and that the defendant herein is in no better attitude to contest the mortgage in question than J. H. or M. E. Cooke would have been.

6. Plaintiffs show that should it be held that the property involved herein, or any part thereof, was the community property of J. H. Cooke and liable to be levied on under execution in favor of W. W. Avery, then they say that the description was wholly sufficient to give the defendant notice of the rights of these plaintiffs in said property, or to give them notice of their rights to the quantity, number, and kind of cattle and stock described in said mortgage. They say, furthermore, that if any other property is in existence covered by that mortgage, that the same is wholly insufficient in value to pay the debts that these plaintiffs hold against J. H. and M. E. Cooke. Wherefore they pray as in their original consolidated petition.

J. J. MATTHEWS,
CRADDOCK & LOONEY, AND
NEYLAND & NEYLAND,
Att'ys for Pl'ff-.

Endorsed: I. Popper & Bro. and R. R. Neyland & Co. *vs.* J. H. Cooke *et al.* 1st amendment to 1st supplemental petition. Filed Oct. 25th, 1897. O. S. Moore, clerk.

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88 *Final Judgment.*

OCT. 26TH, 1897.

I. POPPER & BRO. and R. R. NEYLAND & Company
vs.
J. H. COOKE ET AL.

Nos. 3406 & 3407. Consolidated Case.

On the 26th day of October, 1897, the above case was called for trial, and it was shown to the court that the mandate of the court of civil appeals for the 5th supreme judicial district reversing and remanding this case had been received and filed by the clerk of this court, and a jury being waived, the matters in controversy are submitted to the court; and then came on to be heard the plea to the jurisdiction of the defendant J. M. Avery, and, after hearing the evidence thereon, it is ordered and adjudged by the court that the said plea be in all things overruled and this case retained for trial on its merits; to which action of the court the defendant J. M. Avery excepts; and then came on to be heard the special exceptions of the defendants J. M. Avery, C. C. Cobb, and H. I. Phillips to the jurisdiction of this court, which is by the court overruled and refused; to which action said defendants except; and then came on to be heard the three motions to quash the sequestration proceedings herein filed by said defendants, J. M. Avery, C. C. Cobb, and H. I. Phillips, and, after hearing same, it is ordered by the court that said three motions be in all things sustained and granted, and that all the sequestration proceedings herein, including the affidavits, bonds, writs, and returns thereon for sequestration, except the replevy bonds, be, and
89 they are hereby, quashed and vacated and annulled, and that all costs occasioned thereby be taxed against the plaintiffs, I. Popper & E. Popper and R. R. Neyland, and their sureties on sequestration bonds, W. H. Bush and S. J. Mason, for which let execution issue; to which plaintiffs and defendants, J. M. Avery, C. C. Cobb, & H. I. Phillips, except; and then came on to be heard the motions of defendants J. M. Avery, C. C. Cobb, and H. I. Phillips to be discharged and have judgment rendered in their favor, which motions are by the court overruled and refused; to which said defendants except; and then came on to be heard the motion of defendants J. M. Avery, C. C. Cobb, and H. I. Phillips to tax certain costs against the plaintiffs and require them to be paid before further proceeding with this suit, which motion is refused by the court for the present; to which said defendants except; and then came on to be heard the general and special exceptions of defendants J. M. Avery, C. C. Cobb, and H. I. Phillips contained in their amended answer and their supplemental petition, all of which are by the court overruled and refused; to which said defendants except; and it appearing to the court that plaintiffs have dismissed their suit as to W. W. Avery, it is therefore ordered that plaintiffs take nothing against him, and that he go hence without day; and, after hearing the evidence and argument of counsel, the court took

the case under advisement until this 23rd day of November, 1897, when the court is of the opinion that the law is for plaintiffs and finds for them. It is therefore adjudged and decreed by the court that the plaintiffs I. Popper & Bro., a firm composed of I. Popper and E. Popper, do have and recover of and from the defendants J. H. Cooke the sum of sixteen hundred and thirty-seven ($1,637.00) dollars, together with interest at the rate of 12 per cent. per annum, and that R. R. Neyland do have and recover of and from J. H. Cooke the sum of nineteen hundred and seventy-four ($1,974.00) dollars, together with 12 per cent. interest thereon per annum; and it appearing to the court that the plaintiffs have a valid chattel-mortgage lien on 50 cows, branded Cook on left side and O. K. on left hip; also one bay mare two years old past, branded J 6; also one gray horse two years old past, branded J 6;
90 also one black horse mule — years old past, branded J 6, it is therefore decreed that plaintiffs' lien be, and same is hereby, foreclosed on said property as to the defendants J. H. Cooke, M. E. Cooke, and John M. Avery, and same is here ordered sold for the satisfaction of this judgment. It further appearing to the court that plaintiffs sued out writs of sequestration, which were levied on said property then in the possession of def't John M. Avery, and that def't John M. Avery duly replevied said property, and all of same was released to him on the execution of his replevy bonds, with Chas. C. Cobb & H. I. Phillips as his sureties thereon; and it further appearing to the court that said property so replevied is of the total value of $850.00; and it further appearing to the court that soon after the defendant J. M. Avery replevied the said property that he removed the same from Hunt county and disposed of all of same, and it is now wholly without the power of def't Avery or his sureties on replevy bonds to produce said property or any part thereof in satisfaction or partial satisfaction of this judgment, it is therefore adjudged by the court that plaintiffs herein do have and recover of and from John M. Avery, Chas. C. Cobb, and H. I. Phillips the sum of $850.00, together with 6 per cent. interest thereon from this date, for which let execution issue. It is further ordered that any sum or sums of money that may be realized hereon as the result of the execution of an order of sale or as collected from the obligors on said replevy bonds shall be divided and paid to the plaintiffs herein in proportion to the amounts due each party plaintiff respectively. Let execution issue for any balance remaining unpaid against J. H. Cooke in favor of each party plaintiff for the amount due him respectively, but no personal judgment is rendered against Mrs. M. E. Cooke, wife of J. H. Cooke. It is further ordered that the defendants shall pay all costs created herein, for which let execution issue; to all which said judgment and the conclusions of fact and law of the court said defendants, J. M. Avery, C. C. Cobb, and H. I. Phillips, except and in open court give notice of an appeal to our court of civil appeals for the 5th supreme judicial
91–96 district of Texas. It is further ordered by the court that ten days be allowed after the adjournment of this term of

court in which to make up, sign, and file a statement of facts herein.

* * * * * * *

97 *Findings of Fact and Conclusions of Law.*

Filed Nov. 27, 1897.

In the District Court of Hunt County, Texas, October Term, 1897.

I. POPPER & BRO. and R. R. NEYLAND & Co.
vs.
J. H. COOKE ET AL. } Nos. —.

Findings of fact filed herein at request of pl'ffs.

First. I find that on May 26th, 1891, defendants J. H. and M. E. Cooke, who were then and are now man and wife, made, executed, and delivered to T. H. King their joint and several promissory notes, due November 1st after date, for $1,940.00, with interest from June 1st, 1891, at the rate of 12% per annum, and providing for 10% attorney's fees; that the same was afterwards, about April 10th, 1892, transferred by King as follows: To I. Popper & Bro. an interest of $775.00 in said note and interest thereon, at the rate expressed in the note, from the date of said note, and all the balance of said note and interest was transferred to R. R. Neyland under the name and style of R. R. Neyland & Co. I find there is due I. Popper & Bro. on said note the sum of $1,637.00, and there is yet due R. R. Neyland on said note the sum of $1,974.00.

Second. I find that in order to secure the payment of said
98 note on May 26, 1891, J. H. Cooke and M. E. Cooke made, executed, and delivered to T. H. King their chattel mortgage or instrument in writing whereby they conveyed to said T. H. King, among other property, 50 cows, with their spring calves (spring of 1891), cows branded Cook on left side and O. K. on left hip, the calves at the time not branded; also one bay mare colt; also one gray horse colt, also one black mule colt. Said instrument was legally filed and registered as a chattel mortgage on the chattel mortgage register of Hunt county, Texas, on May 30th, 1891.

Third. I find that about June 14th, 1893, the U. S. marshal levied upon (among others) the property mentioned above, by virtue of an execution issued out of the U. S. circuit court at Dallas on June 8th, 1893, on a judgment therein rendered in favor of W. W. Avery and against J. H. Cooke and sureties on his supersedeas bond, but not against his wife, M. E. Cooke, the said sureties being O. F. Hail, Wm. Hodges, and J. M. Johnston; that J. M. Avery was attorney for W. W. Avery, directing the levies which were all made in Hunt county, Texas, and at the marshal's sale which took place in Hunt county, Texas, on June 28th, 1893, at public outcry, were bid in by J. M. Avery in the name of W. W. Avery, and all of said property was then and there delivered to J. M. Avery.

Fourth. On June 29th, 1893, I. Popper & Bro. and R. R. Neyland & Co. filed suits against defendants, and the property involved herein was sequestered and replevied by defendant J. M. Avery, with the defendants Cobb and Phillips as his sureties on his replevin bonds. After J. M. Avery replevied the same he drove the same out of Hunt county, Texas, and within a short time thereafter sold and disposed of the same, and has none of the same on hand at this time, and would be wholly unable to produce the same in satisfaction or partial satisfaction of judgment rendered herein.

Fifth. At the time of the levy the calves described in the mortgage as the spring calves of the 50 cows had been marked and branded in the mark and brand of M. E. Cooke and were then seventeen head of two-year-old past steers and 33 head of two-year-old past heifers, and the colts were at the time of the levy branded J 6 and were then all two years old past.

99 Sixth. I find that the 50 cows and horses and mules levied upon were the separate property of M. E. Cooke, and that the 50 calves were the community property of J. H. and M. E. Cooke.

Seventh. I find the following values: Cows, $13 50 per head; horses, $50.00 per head; mules, $75.00 per head; 17 two-year-old past steers, $12.00 per head, and 33 two-year-old past heifers, $10.00 per head.

Conclusions of Law.

I conclude that I. Popper & Bro. ought to recover from J. H. Cooke judgment for $1,637.00, with interest, at twelve per cent. per annum, from this date, and that R. R. Neyland & Co. ought to recover from J. H. Cooke $1,974.00, with interest, at 12 per cent. per annum, from this date, and that plaintiffs are entitled to have a foreclosure of their chattel-mortgage lien on the 50 cows, one mare, one horse, and one mule as to defendants J. H. and M. E. Cooke and J. M. Avery; and, having found the value of said property to be $850.00, the plaintiffs are entitled to have judgment against defendant Avery and his sureties on the replevin bonds for that amount, with 6 % interest thereon per annum. I conclude, as to the 50 calves, that the mortgage is invalid, and refuse foreclosure of chattel-mortgage liens to that extent.

HOWARD TEMPLETON, *Judge.*

Endorsed: I. Popper & Bro. and R. R. Neyland & Co. *vs.* J. H. Cooke *et al.* Findings of fact and conclusions of law. Filed November 27, 1897. O. S. Moore, clerk.

100 *Statement of Facts.*

Filed Dec'r 7, 1897.

In District Court, Hunt County.

I. POPPER & BRO. & R. R. NEYLAND & Co.
vs.
J. H. COOKE ET AL. } Consolidated Case.

Statement of facts.

Be it remembered that the following is a full, true, and correct statement of all the facts given in evidence on the trial of the above cause, to wit:

The plea to the jurisdiction filed by the defendant John M. Avery was tried first, and upon the trial of said plea the following was all the testimony introduced, to wit:

The defendant JOHN M. AVERY, being duly sworn, testified as follows:

That at the time of the injuries complained of in plaintiffs' petition and the petition in this consolidated case this day filed, and at the time of the institution of these suits, and at all times between said dates, he resided in Dallas county, State of Texas, and that he has ever since said time resided and still resides in said Dallas county; that he did not at said dates reside in Hunt county, Texas, and does not now and never has resided in said county; that at all of said times he was an inhabitant of the State of Texas; that he is not now and never was a married *woman*; that his said residence is not unknown, but was at all said times well known to plaintiffs; that he is not and never was a transient person, but at all said times he had and still has his permanent home in said Dallas county; that this defendant, John M. Avery, is in no way bound or liable on the note and mortgage sued on herein, and never signed or became bound on either, and he never contracted to perform any obligation to plaintiffs or either of them in said Hunt county; that this suit is not against an executor, administrator, or guardian;

101 that this is not a case of fraud or defalcation of public officers; that the foundation of this suit is not any crime, offense, or treason committed in Hunt county for which a civil action in damages will lie in Hunt county against him; that the cattle, horses, and mules described in plaintiffs' petitions and affidavits herein were levied on, seized, and sold by the U. S. marshal for the northern district of Texas by virtue of a valid judgment and execution against the defendant J. H. Cooke, who was a defendant in said judgment and execution, and he believes they at said time belonged to said J. H. Cooke and were liable to said execution; that at the time when they were so seized under execution and sold, when they are alleged to have been converted by defendant John M. Avery, the said cattle, mules, and horses were not in the posses-

sion of plaintiffs or either of them, but the same were in possession and control of said J. H. Cooke, who was a defendant in said execution; that the possession of said cattle, mules, and horses had never been given to plaintiffs or either of them, and that for a long time prior thereto and at said dates and times said J. H. Cooke had been and was then feeding, watering, and pasturing, attending to and controlling said cattle, mules, and horses, and the same were in said J. H. Cooke's pasture, and Cooke was entitled to possession of same; that this is not a suit for damages growing out of the wrongful levy of a writ of attachment or sequestration; that this is not a suit for the recovery of any personal property; that this is not a suit where the defendants have inherited an estate, concerning which this suit is commenced; that so much of this suit wherein this defendant is alleged to have converted said cattle, horses, and mules, and for damages against him for same, is not a suit for the foreclosure of a mortgage or other lien, and this defendant is not a necessary party to so much of this suit nor a proper party thereto; that this suit is not a suit for the partition of lands or other property; that this is not a suit for the recovery of lands or damages thereto, nor to remove incumbrances upon the title to land, nor to quiet title to land,
nor to prevent or stay waste on lands, nor a suit for divorce,
102 nor to enjoin the execution of a judgment, nor to stay proceedings in any suit, nor a suit to revise the proceedings of the county court in matters of probate; that this suit does not come within any of the other exceptions prescribed by law, which would authorize said suit to be brought and maintained in said Hunt county; that after the property sequestered in this case was delivered to him under his replevy bonds he drove the same out of Hunt county and over into Rockwall county and there sold them.

The above was all the testimony which was introduced on the trial of said plea. Upon the trial of the case on the merits the following was all the testimony introduced, to wit:

Testimony of J. M. Avery.

JOHN M. AVERY, one of the defendants, being called as a witness by the plaintiffs, testified as follows:

I am one of the defendants in this suit. At the time the property involved in this suit was sequestered, it was in my possession in Hunt county. I do not know for certain whether the particular stock that the plaintiffs sues for are the ones that were levied on by me under an execution, but I, as the attorney of W. W. Avery, did levy on a lot of cattle, and I think the ones sequestered in these cases are part of the cattle that were levied upon in the case of W. W. Avery against J. H. Cooke *et al.*, and which were sold by the United States marshal. They were sold by the United States marshal under an execution in that case and bought in by me as the attorney for the plaintiff W. W. Avery. At the time the stock were levied upon they were in some pastures down at Payne's store, in Hunt county, Texas, and they were there at the time of the sale by

the United States marshal. When the stock were sequestered in these cases I replevied them. This was after the sale by the United States marshal. After I replevied them I drove them, with a lot of other stock which had been sold by the United States marshal, out of Hunt county and over into Rockwall county—that is, I drove all the stock I had bought over into Rockwall county except such as got away on the drive. After the stock arrived in Rockwall
103 county I sold and disposed of all of them, and at this time I have sold and disposed of all the stock bought in at the United States marshal's sale.

Testimony of J. H. Cooke.

J. H. COOKE, one of the defendants, being called as a witness for the plaintiffs, testified as follows:

I am the J. H. Cooke who executed the chattel mortgage sued on and which is introduced in evidence. M. E. Cooke, my codefendant, is my wife. The fifty cows mentioned in the chattel mortgage sued on were mostly Durham cattle, and were branded C o o k on the left side and O. K. on the left hip, and were marked swallow fork in the right ear and over and under bit in left ear. These cows were raised by myself and Mrs. Cooke. The mortgage was executed in May, 1891, and described certain calves as following the fifty cows. Those were the calves born in the spring of 1891. At the time the mortgage sued on was executed, Mr. R. R. Neyland was down at Payne's store, and was representing T. H. King and I. Popper as their attorney. The property described in this mortgage was checked out in the pasture, and Mr. Neyland saw it in the pasture. There is a bay mare described in the petition as being a colt at the time of the execution of the mortgage in May, 1891, as being two years old past. That means that this is a two-year-old filley, and is one of the colts following the mare in 1891. Some of the colts mentioned in this chattel mortgage were levied on by Mr. Avery in 1893. There was one two-year-old filley, one two-year-old gray horse, and one two-year-old mule. That was all of the horses and mules levied upon. This levy was made in June, 1893. These horses and mules were branded J. 6. on the left shoulder. At the time of the levy the mule was worth $75.00, the filley was worth $50.00, and the horse was worth $40.00. At that time the two-year old steers were worth $20.00 apiece, the 26 two-year-old heifers were worth $20.00 apiece, and the 7 two-year-old heifers were worth $10.00 apiece, and the fifty cows were worth $15.00 apiece. The stock was moved out
104 of Hunt county by Mr. Avery a few days after the levy and sale, and they were worth at that time as much as when they were levied upon, as above stated. The fifty cows in the chattel mortgage belonged to Mrs. M. E. Cooke, my wife. Her maiden name was Noel. In 1876 she got $500.00 in money from her father's estate, just after we were married. It was paid to me by her guardian. Probably one year or two years after that she came into possession of some land which I sold. I sold the land for $1,500.00 and used the money in business transactions. My wife and I had

an understanding when we were first married that as I was a trading man I would keep all her money to itself, and that I would borrow whatever she received from her father's estate and give her my note for it, and it would be classed as her separate property, and I would pay her interest on it. (Here the witness was shown a deed of trust executed by J. H. Cooke for the benefit of his creditors, in which C. J. Stegar is named as trustee.) In that deed of trust to Stegar I preferred all the creditors that I owed, and amongst them was Mrs. Cooke. I preferred her for something over $5,000.00. The deed of trust prefers her for $5,300.00, and that is the $500.00 and the $1,500.00, with accumulated interest, that I spoke of above. In that deed of trust there was a lot of horses and cattle which were transferred to Stegar. Part of the property in this suit was included in that Stegar deed of trust. My wife bought from Mr. Stegar, trustee, the cows involved in the deed of trust, and also the horses which were included in the Stegar deed of trust, which afterwards had the colts involved in this suit. The fifty calves mentioned in the chattel mortgage involved in this suit were born after my wife purchased the property from Mr. Stegar. The property that she bought from Mr. Stegar did not settle her indebtedness in full. Mr. Stegar sold her the cattle and horses mentioned in his deed of trust, and I was given credit on the $5,300.00 for which I had preferred my wife. There was no money passed in this transaction. After this I bought up some cattle and turned them over to Mrs. Cooke. She had her mark and brand. Prior to the time the chattel mortgage in this suit was given I had bought up cattle
105 over the country, and they were in various marks, but I put them all in the same brand and turned them over to Mrs. Cooke in part payment of the debt I owned her. Some of the cattle that I bought up would have various marks and brands on them. I put the brand C o o k and O K on all of them. Mrs. Cooke's horse brand was J. 6 on the left shoulder. The particular ear-marks described in the chattel mortgage sued on would apply only to the cattle raised by me, unless I bought some yearlings or cows or something of the kind over the country that were not marked at all, and in that event I would put this particular mark on them. At the time the mortgage in this suit was given, in May, 1891, I do not remember the number of cows I had in this same mark and brand and not over seven years old, as described in this mortgage. I expect there were 150 head in all of cows and calves in various marks and brands, but all had this C. o. o. k. O. K. brand on them. I cannot say now that there were any more cows there at the time this mortgage was given of the same identical mark and described in this mortgage that were not over seven years old, but think all of them had the Cook O/K. brand on them.

Upon cross-examination by the defendant John M. Avery this witness testified as follows:

At the present time I could not say definitely whether there were more than 50 cows there at the time the mortgage sued on was given that would suit the description in the mortgage exactly. It has been

a long time since this mortgage was given and since the stock were levied upon, and my memory is not as clear as it was at that time. My depositions have been taken several times in this case. Some of them were taken as early as 1893. At the time my depositions were taken my memory was clear about these old matters, and I think what those depositions say is correct. At the time the mortgage sued on was given I think Mrs. Cooke and I had down there 10 or 12 mares branded J. 6 on the left shoulder. I could not now say exactly how many there was, but we had about 100 head of horses branded that way, and I think there were 10 or 12 mares branded that way, with colts following them, in May, 1891. At the
106 time the mortgage sued on was given, May, 1891, all the stock, including cattle and horses, was down there at Payne's store, in what is known as the Bane Flat pasture. The mortgage that I gave to Stegar in 1889 recites that I then had about 800 head of cattle and about 200 head of hogs and about 100 head of horses and mules and about 8,000 bushels of corn. I think the cattle were overestimated in that mortgage, but the balance is about right. I think there were only about between 400 and 500 head of cattle included in the Stegar mortgage, and this would include 25 or 30 milk cows. In May, 1891, when the chattel mortgage sued on was given, Mrs. Cooke and I had down there in the pasture about 400 head of cattle and about 100 head of horses. The cattle, I think, were all branded Cook O. K. on left hip and the horses were all branded J. 6 on the left shoulder. About one-fourth of the herd of cattle were cows, and most of them had calves following them, and there were about 15 or 16 mares with colts following them. At the time the chattel mortgage sued on was given R. R. Neyland came down to Payne's store. At that time all the cattle I have mentioned were in the Bone Flat pasture. My recollection is that Mr. Neyland and I went over to the pasture one morning or evening. At certain times the cattle would go out on the prairie there and be bunched pretty well. Mr. Neyland and I went in a buggy. We would drive out amongst the cattle, and probably got out of the buggy and walked among them. The cattle were all there, some 400 or 500 head, in the pasture, and Mr. Neyland and I rode out in a buggy and rode out among the cattle. As we drove or walked through the herd I would say to Mr. Neyland, "Here is one, and here is another," to describe the cattle he wanted. We just passed through the herd that way. The cattle mortgaged were not cut out from the herd, nor were they removed from the pasture. That is what I meant by checking them out. The horses were checked out from the herd in the same pasture in practically the same way. The cattle and horses mortgaged to Mr. Neyland were left in the pasture, and were kept in the pasture along with the balance of the stock up to
107 the time they were levied upon. The mortgaged cattle were never taken out and put in another pasture. They were kept along with the balance of the stock. A few days before the chattel mortgage sued on was given, I had given to Mr. T. H. King a bill of sale for about 40 head of cows. These were not delivered to Mr.

King. These cows in the bill of sale were all branded C o o k. O. K. on the left side and hip. Some of the cows in the bill of sale were marked differently to those in the chattel mortgage, but there were probably 10 or 15 of the cows in the King bill of sale that were marked in the same way as those in the chattel mortgage, and were not over seven years old. All of these cows in the King bill of sale were down there in the pasture at the time the mortgage sued on was given. Most of the cattle that Mrs. Cooke and I raised were part Durham. Some of the cattle that I bought were not Durham and some of them were part Durham. Mrs. Cooke and I bred and raised all the colts and calves mentioned in the chattel mortgage sued on. Some of the cows in the King bill of sale were part Durham, too. In June and July, 1893, when these levies were made and these two suits were brought, I think that nearly all the stock mentioned in the chattel mortgage sued on were down there at at Payne's store, except about 8 or 10 head of the horses which I had sold. The balance of the stock mentioned in the chattel mortgage sued on, except that involved in this suit, was not sequestered. I do not know what has become of the balance of the stock now. At the time of the trial of this case before, in January, 1894, I think that the balance of the stock described in the chattel mortgage was down at Payne's store, in Hunt county, except 8 or 10 head of horses and mules which I had sold, and I so testified on the former trial. Leaving out the 8 or 10 head I had sold and those sequestered in this case, I think that the balance of the stock described in the chattel mortgage in June and July, 1893, would have been worth $600.00 or $700.00. Since that time some of the stock have died and some of them have strayed off, and I do not now know how much of the stock is down at Payne's store. I suppose what is there now would
108 probably be worth about $200.00. The plaintiffs have never foreclosed their mortgage on the balance of the stock, so far as I know. In 1892 I sold 8 or 10 head of horses and mules included in this chattel mortgage sued on and received about $800.00 for them. At that time T. H. King held the note sued on, and this sale was made with his consent. I paid him over about $600.00 of this money, telling him that it was part of the proceeds of the sale of this stock, and with his consent I kept $200.00 of the money and used it in my business. I do not know whether Mr. King placed a credit on this note or not. There was included in this chattel mortgage sued on 38 head of horses and mules, and I sold 8 or 10 head of them for about $800.00, as above stated, and I told Mr. King about it. In this deed of trust Mr. Stegar made by me in 1889 there is about $12,000.00 preferred debts which I owed. I do not remember who wrote the deed of trust, but I see that Mathews, Neyland & Neyland are preferred for $250.00, and I think that they wrote it, and that amount is their fee. The amount due R. R. Neyland & Company, claimed in this suit, is about $1,200.00, and some of this claim originated from merchandise that I had bought from R. R. Neyland & Company in 1889, and some of it originated from R. R. Neyland & Company buying a note which a man named Orr held against me for some lumber which I had

bought. All of this arose before my failure in November, 1889. The amount claimed by Popper & Brother in this case was for merchandise bought by me from them before my failure. I do not remember how it came that the R. R. Neyland & Company debt was left out of my Stegar deed of trust. The Popper debt was included in that deed of trust. The Neyland debt may have been mixed up with the $2,100.00 for which the First National Bank of Greenville was preferred. At that time T. H. King was cashier of the First National bank at Greenville, Texas. Just at present I cannot explain how it happened that R. R. Neyland & Company's debt was left out of the deed of trust to Stegar, trustee. The R. R. Neyland & Company debt may have been included in the $2,100.00 for which the First National Bank of Greenville was preferred, but I cannot say definitely about this. I think that most of
109 the debts in that Stegar deed of trust have been paid off. The amount for which the First National Bank of Greenville was preferred has been paid off and settled in full. The Popper & Brother debt has been paid off all except what is claimed in this suit. I still owe my wife some $2,000.00 on the debt for which she was preferred. The cattle and horses mentioned in this Stegar deed of trust were the principal part of my assets, and in the final wind up of the Stegar deed of trust my wife got practically all the cattle and horses included in it. She got them from Mr. Stegar, trustee, by giving credit on the amount due her in the deed of trust. At the time the Stegar deed of trust was given Mr. Stegar was clerking for me down there at Payne's store, and after the deed of trust was given I assisted him in looking after business and seeing that it went right. I do not know whether Stegar ever gave my wife a bill of sale for this stock or not. I have never been able to find a bill of sale from Stegar to my wife and it is not recorded. Out of the debts mentioned in the Stegar deed of trust the Frank D. Schonne & Co. debt of $1,000.00 has never been settled, and there is about $1,000.00 due Popper & Brother, and I also owe the amount claimed by Mr. Neyland in this suit. The balance of the debts I think have about all been settled. The property included in the Stegar deed of trust included all my assets except notes and accounts. Since the Stegar deed of trust was given in 1889, I cannot say what property I have owned subject to execution, but I have never considered myself insolvent. I have had some horses and mules and cotton down there at Payne's store which might have been levied on, but the parties having claims against me never tested the question of my solvency. In May, 1891, when the chattel mortgage sued on was given, I do not know whether anything could have been collected out of me by execution or not. In regard to the judgment in the Federal court against me in favor of W. W. Avery, I will say that I did my best, everything in my power, to keep him from making a dollar of that money because I did not think it was just. The W. W. Avery judgment was for $2,600.00 and, including that judgment, I think that in May,
110 1891, I owed as much as $7,000. I cannot now say what property I had down there at that time subject to execution. Since 1884 I

have been a general dealer down there at Payne's store in cattle and horses. Before the chattel mortgage sued on was given, and since that time, I have been buying and selling horses over the country, and trading in them. I would buy cattle and horses and put them in my pasture and then sell them. Generally when I would put them in the pasture I would brand the cattle C o. o. k O. K., and the horses J. 6, and I would sell such of the stock as I wanted to and buy up others. I had been engaged in business down there at Payne's store since about 1884, and have been a general trader. Prior to 1876 there was a man down in Kaufman county named Andrews, who was the guardian of my wife and her sister, Lillie Noell. My wife was sometimes called Lizzie Noell. This guardianship was in the probate court of Kaufman county. My wife's father was named G. A. Noell, and died in 1862 or 1863. The guardian kept my wife's money until we were married. He kept it loaned out, and would give her part every year to send her to school and for her maintenance. I usually gave my wife a note for the money she loaned me, but I do not know what has become of the note. It was probably torn up or cancelled; every two or three years I would renew the note and tear up the old one. At the time of the former trial in this case, in January, 1894, my wife did not have any note. My wife got $500.00, or rather I got it from her guardian in 1876, and she got about $1,500.00 more in 1878 or 1880. We were married in May, 1876. These amounts were loaned to me soon after she got them and I was to pay her 12 per cent. interest per annum. The $1,500.00 was gotten out of some land belonging to her father's estate. She did not get her title entirely from her father. Her mother's name was Ann Noell, and she afterwards married a man named Hardin. My wife's mother gave her her interest in the land, and my wife's sister gave my wife her interest in the land. I think they executed deeds for their interests, but do not know for sure about this. My wife and I, about 1878 or 1879, conveyed this
111 land to R. S. Willis, at Galveston, Texas, who was the head of the firm of P. J. Willis & Bro. The tract of land which my wife got, and which we conveyed to R. S. Willis, was 126 acres out of the James Vivian survey in Kaufman county, Texas. In the trade of the land to Willis there was no money paid, but I gave my wife notes. This land is the land on which the insane asylum is situated, near Terrell, and the land now belongs to the State of Texas. The man with whom I made the trade for the land in the Willis transaction was named S. M. Fields, who represented P. J. Willis & Bro. I understand that afterwards P. J. Willis & Bro. lost the land, but I do not think they ever deeded the land back to me. G. A. Noell had a certificate for the land and the certificate was deposited at Austin, and I sent $50.00 down there to have a patent issued, but the patent was not issued and we afterwards lost the land—that is, P. J. Willis & Bro. afterwards lost the land. They kept the land some five or six years, and I lost track of it after the asylum was built on it. My mother-in-law, Mrs. Ann Noell, afterwards married a man named Hardin, and she was the administratrix of the estate of G. A. Noell in the county court of Kaufman

county, Texas. My wife and I bred and raised all the calves and colts mentioned in the chattel mortgage sued on, and we also bred and raised all the cows mentioned in the chattel mortgage sued on. In the first deposition which I gave in these cases I requested the notary to allow me to consult with my lawyers about whether I had to answer, and I came up to Greenville and consulted with my lawyer, and took a day or two to answer the depositions. These were the ones taken 1893 or 1894.

On redirect examination this witness testified as follows:

All the property included in the mortgage sued on was the property purchased from Stegar under his deed of trust, except the calves and colts. At the sale by the United States marshal J. M. Avery bought in the property for W. W. Avery, and I think his bid was credited on the execution. In reference to the identical description given in the chattel mortgage sued on, I cannot now say whether I had more than that amount of stock or whether I had less. My attention was not heretofore
112 called to the different marks on the stock, and I was never called on to distinguished the different marks, and I don't think this distinction was called to my attention in my previous depositions, nor do I think I was asked before anything about the ages of the cattle. In regard to the land sold to P. J. Willis & Bro., this was done in settling a debt due them by me, which amounted to about $1,500.00. I understood that Willis afterwards lost the land, but I don't think this was any fault of ours, but was due to the negligence of Mr. Fields. I was not consulted about it and had nothing to do with it. I do not think there was any suit over the land, but that Willis gave it up. R. R. Neyland bought out the old Jim Ragsdale stock in Greenville and ran it under the name of R. R. Neyland & Company. I was indebted to Ragsdale. I was also indebted to Mr. Neyland on a note against me, which he purchased from Mr. Orr. I think Messrs. Mathews & Neyland drew up the Stegar deed of trust and omitted the R. R. Neyland debt, and that that night or the next day he came down to see me about it. The 8 or 10 horses and mules that I sold out of this mortgaged stock in 1892 were heavy stock, and the best that there was in the mortgage. I sold the stock with the consent of Mr. King and kept back $200.00 with his consent. In June and July, at the time of this levy, and the time these suits were brought, I think that practically all the balance of the stock included in this chattel mortgage were down there at Payne's store. Since that time some of them have died and strayed away, but I cannot tell how many—probably 7 or 8 have died and probably that many have strayed away. I do not now know whether any of the stock in this chattel mortgage sued on are down there or not. I think that the horses and mules included in this chattel mortgage which were not sequestered at the time of this levy, in 1893, were worth about $600.00. I do not think they would be worth over $200.00 now. I have not seen any of them in some considerable time. I guess half of them have died.

On recross-examination this witness testified as follows:

113 At the former trial of this case, in January, 1894, I testified that all of that stock was down there at Payne's store except 8 or 10 head which I had sold in 1892 and those which had been sequestered in this suit. Since that time I have not sold any of the stock and have done nothing with them. I told the plaintiffs in this suit that the property sequestered had been levied upon. The plaintiffs have never undertaken to gather the balance of the stock included in the chattel mortgage sued on. I do not think the plaintiffs have ever bothered about the balance of the stock included in the chattel mortgage sued on, except that which was sequestered by them. This chattel mortgage is about correct. At the time I gave the deed of trust to Stegar, as trustee, in November, 1889, I estimated that I had about 800 head of cattle, as stated therein, and several thousand bushels of corn. At the time said deed of trust to Stegar was given I had about 100 head of milk cows and calves in the bunch of cattle conveyed by that deed of trust and about two hundred head of hogs. All of this stock mentioned in this deed of trust was at the time it was given in the pasture down at Payne's store, except a few which may have got out and scattered over the country and on the range.

In May, 1891, I gave a bill of sale to Mr. T. H. King for about 40 cows, which were also branded C o o k on left side and O. K. on left hip and marked in the same way as those described in the chattel mortgage sued on. At the time this chattel mortgage sued on was given those King cattle contained in his bill of sale were down there at Payne's store with the balance of the cattle, including those in this mortgage. At the time this chattel mortgage sued on was given, in May, 1891, Mrs. Cooke had down there at Payne's store, in the pasture, about 100 head of cows, with calves following them, marked and branded the same as those in the chattel mortgage, and had there some 10 or 12 mares, branded J. 6, with colts following them, in that pasture.

Chattel Mortgage Sued on.

The plaintiffs then introduced in evidence the chattel mort-

114 gage sued on executed by J. H. Cooke and his wife, M. E. Cooke, to T. H. King, dated May 26th, 1891, and which is in substance as follows:

The said J. H. Cooke and Mrs. M. E. Cooke, wife of said J. H. Cooke, of the county of Hunt, State of Texas, hereby convey in trust to T. H. King, of Hunt county, Texas, the following-described property, to wit: 1 gray horse mule, 5 years old, right eye out, no brand; 1 gray mare mule 15 hands high, branded I. L. on left shoulder, five years old; 1 black mare mule branded I. L., 15 hands high, 5 years old; 1 bay mare mule, 16 hands high, no brand, 8 years old; 1 bay horse mule, 7 years old, branded 4, 16 hands high; 1 black horse mule, branded H on left shoulder, 15 hands high, 8 years old; 1 mouse-colored mule, 15 hands high, 10 years old, no brand; # 4 bay horses, 14½ hands high, 4 years old; 2 brown mares,

14½ hands high, 4 years old; 4 sorrel mares, 14 hands high, 4 years old; 2 sorrel mares, 15 hands high, 7 years old; 2 sorrel mares, 13½ hands high, 2 years old; 2 bay mares, 15 hands high, 7 years old, and one colt of one of the mares known as Park's mares; 2 gray horse colts, 13½ hands high, 3 years old; 1 bay mare and mule colt, mare 6 years old; 1 bay mare and colt, mare 5 years old; 1 bay mare, 4 years old, known as the Key filley; 1 Sam. Bass colt, 2 years old, a bay; 1 black filley, 2 years old; 1 bay Fanning filley and colt; 1 sorrel bay Bateman filley, 3 years old; #1 sorrel horse, 3 years old. (All the stock described between the marks thus # are branded J. 6 on left shoulder.)

4 two-year-old mules } Branded with a cross on left jaw and hip.
1 one-year-old mule }

Also 50 head of cows, with this spring calves following the cows, not over 7 years old, cows branded Cook on left side and O. K. on left hip, and marked swallow fork in right ear, and over and under bit in left ear; calves to be marked and branded. All of said mules, colsts, horses, and mares are in pasture or at work on our farm at Payne's store, Hunt county, Texas, and all cows and cal-es are in said pasture or on range near Payne's store, Hunt county, Texas; which said conveyance is made for the purpose of securing a note this day given by us to said T. H. King for the sum of nineteen hundred and forty dollars, and bearing 12 per cent. interest
115 from June 1st, 1891, and 10 per cent. attorney's fees if collected by law, payable the 1st day of November, 1891; and it is agreed that the above-described property is to remain in our possession until the maturity of said note, and that said note, notwithstanding the tenor thereof, shall become due and payable immediately if said property is removed out of precinct of said county or disposed of by us; and in case said note is not paid in full at maturity thereof, as provided in this instrument, then in that event said T. H. King or the holder of said note is authorized to advertise and sell said property to the highest bidder in front of the court-house door in the city of Greenville, Hunt county, Texas, by first posting notices in three public places in said county for ten days prior to said sale, &c. Said instrument was duly filed and registered as a chattel mortgage in Hunt county, Texas, on May 30th, 1891.

(To the introduction of which instrument in evidence the defendant objected on the ground of variance and as not being sufficiently pleaded, as set forth in the said defendant's bill of exception filed herein; but the court overruled said objection and admitted said instrument; to which said defendant excepted.)

Papers in Sequestration Suits.

The plaintiffs then introduced in evidence the papers in these suits for sequestration, which are on file in this case.

To the introduction of which defendant Avery objected becaus all these sequestration proceedings had been quashed and this evi

dence was immaterial; but the court overruled said objection; to which said defendant excepted then and there in open court.

Plaintiffs then introduced in evidence a paper purporting to be a schedule of the separate property of the defendant Mrs. M. E. Cooke, wife of the defendant J. H. Cooke. This paper was sworn to by Mrs. M. E. Cooke on the 20th day of December, 1890, before C. J. Stegar, a notary public, and was filed for record in the county clerk's office of Hunt county on the 23rd day of December, 1890, and duly recorded, said paper being as follows:

116 *Schedule of Separate Property.*

THE STATE OF TEXAS, }
Hunt County. }

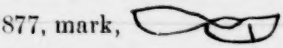
I hereby present to C. J. Stegar, a notary public of Hunt county, Texas, the following statement and schedule: I, M. E. Cooke, am the wife of J. H. Cooke, of Hunt county, Texas, in which county and State we both reside; that I am the owner by my own right and in my own name and as my own separate property of all the cattle branded C o o k on left side and O. K. on left hip, various marks. My brand is duly recorded in Hunt county, Texas. I am the owner of all the horses and mules branded J. 6 on the left shoulder, the last brand being also duly recorded in Hunt county, Texas, all of said stock being in Hunt county, Texas.

To the introduction of this paper the defendant John M. Avery objected on the ground that it was immaterial and irrelevant, but the court overruled said objection and admitted the paper in evidence; to which said defendant then and there excepted.

The plaintiffs then offered in evidence a certificate of the county clerk of Hunt county, which is as follows:

Certificate of Marks and Brands.

STATE OF TEXAS, }
Hunt County. }

I, T. A. Smith, clerk of the county court of Hunt county, Texas, do hereby certify that there appears upon the Record of Marks and Brands of Hunt County, Texas, a mark and brand No. 175 recorded in the name of M. E. Cooke on July 23rd, 1877, mark,  brand, C o o k and O K left hip and side, as shown on page 7; also there appears on page 61 of the same book, No. 1655, a mark and brand recorded in name of M. E. Cooke, brand J. 6 left shoulder and hip, on Nov. 6th, 1883.

Witness my hand and seal, at Greenville, Texas, Jan'y 10th, 1894.

T. A. SMITH,
County Clerk, Hunt County, Texas.

To which the defendant John M. Avery objected on the ground that it was immaterial, but the court overruled said objection and admitted said certificate in evidence; to which said defendant excepted.

117 *Deed of Trust, J. H. Cooke to C. J. Stegar, Trustee.*

The plaintiffs then introduced in evidence a deed of trust executed by the defendant J. H. Cooke to C. J. Stegar, trustee, dated November 15th, 1889, and duly acknowledged and filed and registered as a chattel mortgage on November 16th, 1889, in the county clerk's office of Hunt county. Said deed of trust recites that the said J. H. Cooke, of Hunt county, Texas, is justly indebted to the following-named parties in the following amounts, to wit:

State and county taxes	$300.00
Mathews, Neyland & Neyland	250.00
First National Bank of Greenville	2,186.00
I. Popper & Bro.	1,039.87
Frank D. Lelonne & Co.	1,000.00
O'Neal & Evans, of Greenville	500.00
Garnett Bros.	265.00
Freiberg, Klein & Co.	175.00
J. F. Sockwell, of Greenville	250.00
Hughes Bros., Dallas, Texas	200.00
Cullen & Newman, Knoxville, Tenn.	200.00
Miller & Wormsey, St. Louis	150.00
D. M. Ferry, Detroit, Michigan	56.00
J. G. Boog, Dallas	300.00
Bud McUlmurray, Hunt county	200.00
Mrs. M. E. Cooke (my wife)	5,300.00
Trippett	200.00
Gee & Wilson, of Greenville	300.00

Also an amount due Blankenship & Blake Company, of Dallas, Texas; the exact amount is not known, as it has not been adjusted between Cooke and said company.

The instrument conveys to Stegar his stock of goods in his store-room at Payne's store, estimated to be worth $4,000.00; also
118 all corn on hand on his premises 14 miles S. of Greenville, estimated at 8,000 bushels, except 300 bushels reserved for home consumption; also all cattle now owned by me on my said premises and on the ranch near by, except 5 milch cows and their calves and one yoke of work-oxen, reserved as exempt property, estimated to be about 800 head; also all hogs now owned by me, except 20 head for family use as supplies, estimated at about 200 head; also all horses and mules owned by me, estimated to be about 100 head, including thoroughbred stable horse, except two work-horses, called by name- Dutch and Conel, which are kept for family use; also one thoroughbred jack, worth about $250.00. By the instrument Stegar is authorized to take possession of the property and employ

clerks, &c., and pay expenses, and sell same and pay off the above debts in full in the order they are named above.

The plaintiff then introduced in evidence the note sued on herein, together with the transfer thereof on the back of it; which note and transfer are as follows:

Note Sued On.

$1,940.00. GREENVILLE, TEXAS, *May 26th*, 1891.

On November 1st after date we or either of us promise to pay to T. H. King, at the First National Bank of Greenville, nineteen hundred and forty dollars, with interest from June 1st, 1891, at 12 per cent. per at annum, negotiable and payable at Greenville, Texas, and 10 per cent. attorney's fees if placed in the hands of an attorney for collection. The drawers and endorsers severally waive presentment for payment, protest, and notice of protest and non-payment of this note.

J. H. COOKE.
M. E. COOKE.

Seven hundred and seventy-five dollars and interest from date of this note transferred to I. Popper & Bro., and the balance of the note transferred to R. R. Neyland & Co., both transfers being made without recourse on me in law or equity.

T. H. KING.

119 To introduction of which note and transfer the defendant John M. Avery objected on the ground of variance, as stated in his bill of exceptions filed herein; but the court overruled said objection and admitted the same in evidence; to which said defendant excepted.

The plaintiff, R. R. Neyland, being called as a witness for the plaintiff, testified as follows:

Testimony of R. R. Neyland.

I cannot tell exactly who owned all the original claims sued on against Mr. Cooke or how they were originally made. I owned a hardware stock, the old Ragsdale stock, and part of the indebtedness was created in that way. The business of the old concern was run in the name of R. R. Neyland & Company, but I in fact owned it. Some of the Cooke indebtedness sued on, I think, was for hardware and some of it was for a note which we had purchased from Mr. Orr, but all of it was merged into a note payable to R. R. Neyland & Company. Subsequently Mr. Popper placed in my hands for collection an indebtedness, somewhere in the neighborhood of $700.00, against Mr. Cooke, and feeling that I ought not to take a collection over mine to the disadvantage of a client, I placed it on an equality with mine, and told him so at the time I took it. The matters stood in that shape, I think, at the time Mr. Cooke made his chattel mortgage sued on. If I am not mistaken, I gave my

brother and Judge Mathews a list of my Cooke indebtedness. It is my recollection that my claim was the first upon the list to be preferred, or second, and was put in a safe place. I had other business to attend to, and Judge Mathews said that he and my brother would write up the Stegar chattel mortgage, and they proceeded to write it up, and by oversight they omitted my claim. The first I saw of it was on examination of the chattel mortgage a few days later. My brother then went down to Mr. Cooke's house, and came back satisfied that the matter would be arranged in some way, and we subsequently adjusted the matter. I was indebted to T. H. King and Mr. Popper was indebted to Mr. King, and we made one note of it payable to
120 Mr. King and took security upon cattle belonging to Mr. Cooke, which is the mortgage in this suit. After that, when it became necessary, when I became satisfied that the matter was going to result in litigation, we had Mr. King to transfer to us our interest in the note respectively. It is my recollection that I wrote the endorsements on the note myself, and I transferred Mr. Popper's interest to him and the remainder to myself, using the term company as distinguishing it from my other business, with interest on it, and of course I carried the mortgage with it. At the time that Stegar deed of trust was given I was afraid I would lose all that Cooke owed me. I knew that Mr. King was a strong friend of Mr. Cooke. Mr. Cooke and I had clashed rather considerably in the P. J. Willis & Bro. matter, and I did not believe it hardly probable that Mr. Cooke would be as willing to secure me as he would be to secure Mr. King and Mr. Popper; but there was another reason at that time. I was pretty heavily involved at the First National Bank of Greenville, of which Mr. King was cashier, and I was putting up everything I had as security.

(To all of the above testimony the defendant J. M. Avery objected, because there was no allegation in plaintiff's pleadings under which said testimony was admissible, and because this defendant, Avery, was not a party to any of those proceedings, and knew nothing about such claims and reasons, &c.; but the court overruled said objections and admitted said testimony; to which action the defendant then and there excepted in open court.)

On cross-examination this witness testified as *as* follows:

I was an attorney and a member of the firm of Mathews, Neyland & Neyland. They are preferred in this Stegar deed of trust for $250.00, which was for attorneys' fees. This was paid in gold for writing that chattel deed of trust. I gave that firm a list containing my indebtedness, but my borther seems to have overlooked it in writing the Stegar deed of trust. The original indebtedness of Mr. Cooke to me arose in 1887. Anyhow, it was before Mr. Cooke failed, in November, 1889. I do not know what has become of the original notes. I believe I delivered them to Mr. Cooke when
121 he executed this chattel mortgage. About the same time I got this chattel mortgage I also got a bill of sale from Mr. Cooke to Mr. King for some cows. These cows were left down there

with Mr. Cooke; that bill of sale is dated May 30, 1891, and I believe that is the true date. Some time after that we sold some of these cows. In regard to this $300.00 which is credited on the note sued on, I think it was brought to me by Mr. Wagner. He brought it from Mr. Cooke—that is, my recollection is $200.00 of this credit was paid in this way; but in regard to the other $100.00 I do not remember exactly, but it was probably paid to me by Mr. Cooke. This $300.00 is all I ever got on the note sued on. Up to the time of the endorsement on the note, dated April 10, 1892, the note was in the hands of Mr. King. I have never gotten anything else on this note sued on except the $300.00. I did not levy or sequester the balance of the stock in this chattel mortgage, because I did not know where it was. I have made inquiries, but could never find any of the balance of the stock. At the time this chattel mortgage was given, in May, 1891, the only agreement I had with Mr. Cooke was that he was to take good care of the property described in it, and that he was to keep the stock carefully, and that if he would secure me well I would not press him, and would let him pay me as fast as he possibly could, but he must not sell any of the property. When my claim was left out of the Stegar deed of trust in November, 1889, I thought I was completely left. I think that since that Stegar deed of trust in November, 1889, Mr. Cooke has been insolvent.

Here plaintiffs rested.

Testimony of C. J. Stegar.

C. J. STEGAR, a witness for the defendant John M. Avery, testified as follows:

I live at Payne's store, Hunt county, Texas; have lived there about 11 years, and am the justice of the peace down there. I know the defendants J. H. Cooke and wife, M. E. Cooke, and have known them about 13 years. I worked for Mr. Cooke while he was in the mercantile business. He gave a deed of trust to me in November, 1889, to secure his creditors.
122 This is the deed of trust already in evidence. I was working for him at that time—clerking for him. The cattle, horses, and hogs in this deed of trust were in some pastures he had at that time. There might have been a few out on the range. The fence around the pasture got down in some places, and there were two or three wire gates which had been left open, and some few of the cattle would get out, but most of them were kept in the pasture. In November, 1890, as such trustee, I sold Mrs. M. E. Cooke the cattle described in the deed of trust. The trade with me was made by Mr. Cooke, and he told me that his wife, Mrs. M. E. Cooke, wanted to buy the cattle. Most of these cattle were branded C o o k on left side and O. K. on left hip. I never counted the cattle which I sold her. They offered me a certain amount for the cattle, and we made a trade that way. I suppose there was between 250 and 300 head. We did not gather and bunch them; but just estimated them at about that number. I never sold Mr. or Mrs. Cooke any

horses. I received $1,500.00 in money for the cattle. Mr. Cooke paid me the money, but said it was paid for Mrs. Cooke. I deposited the money in the First National Bank of Greenville. I never executed any bill of sale for these cattle to Mr. or Mrs. Cooke. I received some corn under this deed of trust. I think there was about 200 bushels, and it was sold to Joe Hurst at 25 cents per bushel. I did not receive this money; but my understanding was that it was deposited in the First National Bank of Greenville. I understand that the First National Bank of Greenville applied all of this money on its debt mentioned in said deed of trust. I never paid any of the other debts mentioned in said deed of trust, and I do not know of any of them being settled. I think, though, that Mr. Cooke has paid off some few of the small debts therein. Mr. and Mrs. Cooke live there at Payne's store. Since that deed of trust was made to me I do not know of any property which J. H. Cooke has had which was claimed by him except two or three saddle horses. All the stock down there has been claimed by his wife, Mrs. M. E. Cooke. At the time this chattel mortgage to King was given, in May, 1891,

I did not know much about Mr. and Mrs. Cooke's cattle,
123 but think that they had between 300 or 400 head, and I think
in that herd was about 75 cows with calves following them.

Most of these cattle claimed by Mrs. Cooke were branded C o o k, O. K., and marked with a swallow fork in right ear and over and under bit in the left ear. Prior to the time of this sale by me to Mrs. Cooke, all these cattle branded C o o k, O. K., and marked swallow fork in the right and over & under bit in the left ear, had been claimed by Mrs. Cooke as her separate property. She had claimed them ever since I knew Mr. and Mrs. Cooke.

On cross-examination by the plaintiffs, this witness testified as follows:

At the time this deed of trust was made to me most of the cattle therein were in the pasture, except a few which would get out and be brought back. Mr. Cooke was not keeping what was called a range stock of cattle. The cattle conveyed to me in the deed of trust was in various brands and marks. I did not get Bob Powell to brand out and deliver these cattle to Mrs. Cooke. I sold them to her on the range and in the pasture. I think they were branded C o o k, O. K., after she bought them, but I did not order any one to do this. My estimate of the number of cattle I sold her is from memory. I think the amount of money I got for them at the time was their fair and reasonable value. Before Mr. Cooke made this deed of trust I always considered him solvent, but since that time I have never known of his having anything there except what was claimed by his wife. He had some notes and accounts, and since the deed of trust was given he has been trading and buying cattle on these accounts. I cannot say positively how many cows Mrs. Cooke had at the time the chattel mortgage sued on was given, but estimate that she had 75 or 100 head, as that would be the usual number of cows and calves in such a herd of cattle.

The defendant John M. Avery then introduced in evidence a certified copy of the following proceedings and records in the case of W. W. Avery *vs.* J. H. Cooke *et al.*, No. 1036, in the circuit court of the United States for the northern district of Texas, at Dallas, to wit:

124 *Judgment, Execution, and Return, etc.*

1st. A judgment therein rendered on June 10th, 1889, in favor of said W. W. Avery and against defendants J. H. Cooke and M. E. Cooke, for the title and possession of 200 acres of land situated at Payne's store, Hunt county, Texas, and also the said W. W. Avery recovered against the defendant- J. H. & M. E. Cooke a judgment for the sum of $2,638.12½, with interest thereon from that date at the rate of 8 per cent. per annum and costs of suit.

2nd. A supersedeas writ of error bond, signed by J. H. Cooke and M. E. Cooke, as principals, and William Hodges, O. F. Hail, and J. M. Johnston, as sureties, for the sum of $7,000.00, and payable to the said W. W. Avery, and given for the purpose of superseding the execution of the above judgment and for the purpose of carrying said case to the Supreme Court of the United States on writ of error, and conditioned as required by law in such cases, which bond was approved as a supersedeas bond on June 17th, 1889, by A. P. McCormick, U. S. district judge, and filed in said case on the same day.

3rd. The mandate from the Supreme Court of the United States in said case, showing that on January 23rd, 1893, said judgment was in all things affirmed by the Supreme Court of the United States as against said J. H. Cooke and in all other respects except as to the damages and costs adjudged against M. E. Cooke, and it was ordered that the case be remanded to said circuit court with a direction to order the judgment to be modified so as to conform to the opinion of the Supreme Court. This mandate was received and filed in said U. S. circuit court on May 22nd, 1893.

4th. The judgment of said circuit court of the United States, rendered June 5, 1893, after notice to all the parties and the sureties on said supersedeas bond. By this judgment said W. W. Avery recovered the title and possession of said tract of land as against all parties to said suit, for which a writ of possession was
125 awarded, and he also recovered a judgment against the defendant J. H. Cooke and said sureties, O. F. Hail, William Hodges, and J. M. Johnston, for the sum of $2,638.12½, with interest thereon from the 10th day of June, 1889, at the rate of eight per cent. per annum, and the costs incurred in said circuit court.

5th. An execution issued on said judgment by the clerk of said circuit court, dated 8th day of June, 1893, in favor of said W. W. Avery and against said J. H. Cooke and O. F. Hail, Wm. Hodges, and J. M. Johnston for the sum of $2,638.12½, with interest thereon, at the rate of 8 per cent. per annum, from the 10th day of June, 1889, and costs of suit, said execution being in the proper form

and directed to the marshal of the United States for the northern district of Texas.

6th. The return of the said marshal of the United States for the northern district of Texas on said execution and attached to it, a part of which return is as follows: And on the 14th day of June, 1893, I further executed this writ by levying on the following-described property, to wit: 13 three-year-old steers, 18 five-year-old steers, 42 cows, one heifer, all branded R. I. P. on left side and O. K. on left hip; five calves, no brands; 1 two-year-old steer, 6 three-year-old steers, 3 four-year-old steers, one five-year-old steer, 60 calves, 2 heifers, one bull, all branded C o o k on left side and O. K. on left hip; 9 calves, no brands; 1 four-year-old steer, branded 73; 2 three-year-old steers, branded G o o d; 1 three-year-old steer, branded O. K. The above-described cattle are in a pasture about two miles S. W. from Payne's store and known as the Hale pasture. On the same day I levied on the following-described property, to wit: 5 cows, 10 two-year-old heifers, 17 yearling heifers, all branded R. I. P. on left side and O. K. on left hip; 18 steer yearlings, 10 two-year-old steers, five cows, 15 yearling heifers, 5 two-year-old heifers, all branded C o o k on left side and O. K. on left hip; 2 calves, no brands; 1 heifer, no brand; 1 steer yearling, no brand; 1 cow, no brand; 1 brindle cow, branded 1 1 1 on left side; one black-spotted cow, no brand; 1 heifer, branded M. V. on side and hip; three yearlings, branded O. K.;
126 1 red bull yearling, 1 spotted bull yearling, 1 two-year-old heifer, no brand; two bull yearlings, no brand; red heifer, no brand; 1 steer yearling, no brand; 1 black steer yearling, no brand; 1 two-year-old steer, 1 three-year-old steer, no brand; 1 cow, branded O 7 left hip; 1 heifer, branded O. K.; 1 heifer, no brand; 1 cow, branded P O left side; 1 cow, branded T F side and hip; 1 heifer, branded O. K.; 1 cow, branded KID; 1 red bull yearling; 1 black spotted bull; 1 two-year-old steer, no brand; 1 heifer yearling, no brand; 1 yellow spotted heifer, no brand; 1 white spotted steer, no brand; 1 heifer yearling; 1 brindle steer yearling. These last-described 122 head of cattle are in a pasture known as the Bane Flat pasture, situated about one mile south from Payne's store, Hunt county, Texas. And on the fifteenth day of June, 1893, I levied on the following-described property, to wit: 1 bay mare, two years old, branded J. 6 on left shoulder; 1 gray horse, two years old, branded J. 6 on left shoulder; 1 black mule, 2 years old, branded J. 6 on left shoulder; 2 black mules, 1 year old, branded J. 6; 1 sorrel mule, one year old, no brand; 1 bay colt, no brand; 1 sorrel mare colt, 1 year old, no brand; 1 bay horse, 2 years old, branded J. 6; 1 bay filley, two years old, branded J. 6; 1 bay filley, one year old, white hind feet branded J. 6; 1 gray filley, 1 year old, no brand. These horses and mules are in the Bane Flat pasture described above. And on the same day I levied on the following-described property, to wit: 1 bay horse mule, two years old, branded J 6 on left shoulder; 1 sorrel colt, following sorrel mare, no brands; 1 bay colt, no brand, following bay mare; 1

mule colt, following bay mare. These colts are in the Hale pasture described above.

Said marshal's return further showed that, after proper advertisement, all of the above property was sold at Payne's store, Hunt county, Texas, on June 28th, 1893, at public outcry, in accordance with law, and at such sale all of said property was struck off to W. W. Avery and delivered to J. M. Avery, his attorney.

Testimony of W. T. Good.

W. T. GOOD, a witness for defendant John M. Avery, testified as follows:

I live at Payne's store, Hunt county, Texas, and was raised
127 there. I know the defendant J. H. Cooke and his wife, M. E. Cooke, and have known them 10 or 11 years. Prior to June, 1893, I rented the storehouse down there from Mr. Cooke. I was down there at the time the U. S. marshal made the levy on these cattle in the case of W. W. Avery *vs.* J. H. Cooke *et al.*, and I held them and attended to them for the marshal, and I was present at the sale of them *of them* by the marshal. I think that the return of the marshal on said execution is correct. The defendant J. M. Avery bid on the cattle at said sale and they were struck off to him. After said sale the cattle were left by him in my charge. The next morning a deputy sheriff of Hunt county came down there and took some of these cows, heifers, and steers under these writs of sequestration. Mr. M. W. Neyland came with him. They took a part of the cattle that had been bought in at the marshal's sale, and the defendant J. M. Avery replevied them. I do not know how the deputy sheriff managed to identify the cattle he took. They were all in the pasture together, and I do not remember who pointed out the cattle to the deputy sheriff. After the deputy sheriff took out these cattle I think there was left in the bunch some heifers and steers branded C o o k, O. K.

On cross-examination by plaintiff this witness testified as follows:

I cannot say exactly whether there was any C o o k, O. K. cattle left in the pasture after the deputy sheriff had cut these out or not; but to the best of my knowledge I think there were. I could not say whether there was any such two-year-old steers or two-year-old heifers left. The defendant J. M. Avery hired me to drive the cattle bought at the marshal's sale away. We drove part of them to Royse and part of them to the pasture up by Rockwall. We drove them out of Hunt county. Mr. Avery was there pointing out the cattle to the U. S. marshal, and he helped to gather the cattle and to drive them away. Mr. Avery instructed me to drive out all the cattle in the pasture which had been sold at the marshal's sale. I
had nothing to do with the cattle before the marshal's sale.
128 Before the levy of the U. S. marshal, I heard Mr. Cooke state to Mr. Avery that the C o o k, O. K. cattle belonged to Mrs. M. E. Cooke, and the R I P, O K cattle belonged to Joe Hurst. At the sale by the U. S. marshal I heard Mr. Looney give a public

notice of the interests which Mr. King, Mr. Popper, Mr. Neyland, Mr. Hardin, Mr. Hurst, and Mrs. Cooke had in these cattle.

Depositions of Defendants J. H. & M. E. Cooke, Taken December 19, 1893.

The defendant J. M. Avery introduced in evidence the deposition- of defendants J. H. Cooke and M. E. Cooke, taken December 19, 1893, in which they testify as follows: M. E. Cooke inherited property from her father. She received about $500.00 in 1876 from the estate and about $1,500.00 from the sale of land in 1880. This is all that she received. M. E. Cooke received from her father's estate about $500.00 in money in the summer of 1876. She also received the proceeds of the land in money in 1880, amounting to about $1,500.00. At the time the chattel mortgage sued on was given, in May, 1891, M. E. Cooke had in the pasture and on the range near Payne's store, in Hunt county, Texas, more than fifty cows, with spring calves following the cows, and with the same marks and brand as those described in said chattel mortgage. Said cows and calves described in said chattel mortgage were not delivered to T. H. King, mortgagee, and they were kept, with the other cows and calves of the same marks and brands, by J. H. and M. E. Cooke.

Bond for Title from G. A. Noell to J. T. Rayel.

The defendant J. M. Avery then introduced in evidence the following papers, to wit:

1. A bond for title executed by G. A. Noell, of the county of Kaufman, to James T. Rayel, wherein he bound himself to convey to the said James T. Rayel 126 acres of land out of the James Vivian survey in Kaufman county, Texas, and described as follows:
129 Beginning 1,847 varas northwest of the west corner of the A. Bennett survey, thence south 45° west 895 varas, thence south 54° east 895 varas, thence north 45° east 895 varas, thence north 45° west 895 varas to the place of beginning. This bond for title is dated October 5th, 1861, and is signed by G. A. Noell and properly acknowledged and filed for record in Kaufman county on October 6th, 1861, and duly recorded.

2. A certified copy of an order from the probate court of Kaufman county appointing Mrs. Ann Noell administratrix of the estate of G. A. Noell, deceased. This order was made February 23rd, 1863.

3rd. A certified copy of an order from the probate court of Kaufman county, dated November 18th, 1863, wherein it is recited that J. T. Rayel had presented his petition to the court asking for a decree requiring the administratrix of G. A. Noell to make him a deed, reciting the bond for title above mentioned, covering the above 126 acres of the James Vivian survey, and thereupon the court ordered that Mrs. Ann Noell, administratrix, make the said J. T. Rayel a good and sufficient deed to said property.

4. A deed dated April 7th, 1864, made by Mrs. Ann Noell, ad-

ministratrix of G. A. Noell, deceased, conveying to J. T. Rayel the above 126 acres of the James Vivian survey, and reciting the above order of the probate court. This deed is dated April 7th, 1864, and properly acknowledged and filed for record in Kaufman county April 16, 1864, and duly recorded.

5. The defendant J. M. Avery then introduced in evidence recorded deeds covering said 126 acres of land out of the James Vivian survey above described, showing a consecutive chain of title from J. T. Rayel into the State of Texas and showing that the title to said 126 acres was vested in the State of Texas.

6. Defendant J. M. Avery then introduced in evidence a deed signed by defendants J. H. Cooke and M. E. Cooke, of Hunt county, and properly acknowledged, dated the 27th day of November, 1879, conveying 126 acres of the James Vivian survey above described. This deed recites a consideration of $1,200.00 cash in hand paid by
R. S. Willis, of Galveston county, Texas, and conveys to the
130 said Willis said 126 acres. This deed was filed for record in
Kaufman county, Texas, on December 4th, 1879, and duly recorded.

7. The defendant J. M. Avery then introduced in evidence a deed from Geo. V. Payne to M. E. Cooke, which was properly executed and acknowledged, dated the 28th day of March, 1884, conveying to defendant M. E. Cooke an interest in 229 acres of the Joseph Lynch survey, in Hunt county, Texas. This deed was filed for record in Hunt county, Texas, on June 2nd, 1884, and properly recorded. This deed recites the consideration as follows: "In consideration of the sum of $300.00 to me in hand paid by M. E. Cooke out of her separate property, the receipt of which is hereby acknowledged."

8. The defendant John M. Avery then introduced in evidence a deed executed by J. H. Hill and R. A. Hill and A. Mason and Jesse Mason to defendant Mrs. M. E. Cooke, conveying an interest in 229 acres of land in Hunt county, Texas, out of the Joseph Lynch survey. This deed is dated March 28th, 1884, and properly acknowledged and filed for record in Hunt county on March 31st, 1884. This deed recites the consideration as follows: "In consideration of the sum of ($1,075.00) one thousand and seventy-five dollars to us in hand paid, the receipt whereof is hereby acknowledged, the consideration hereinbefore named being paid out of the separate property and funds of the said M. E. Cooke."

9. The defendant John W. Avery then introduced in evidence a certified copy from the probate court of Kaufman county of a report made to said court by A. G. Andrews, guardian of Lizzie Noell and Lillie Noell, minors. This report was sworn to by A. G. Andrews May 27th, 1875, and was filed in said court on May 27th, 1875. In this report the guardian charged himself with the total amount received by him as being $747.11, but states that he has expended for education and support of the minor Lizzie Noell $325.60, and that he has expended for the minor Lillie Noell $249.57, and that he is entitled to 5 per cent. commissions on the amount received, $747.11, making $37.25; total amount expended, $612.52. He also claims

5 per cent. commission on the total amount paid out, making $28.75. He also claims a credit of a fee paid to H. P. Teague,
131 attorney, as per order of the court, $20.00. In recapitulation he states that he received in all $747.11; that he has paid out and is entitled to credits amounting to $661.27, and that the balance due both of said minors on that day, May 27, 1875, was only $85.84. There was attached to said report an itemized account of the expenditures made on behalf of his said wards, accompanied by vouchers. This itemized account began in 1871 and extended to May, 1875.

Judgment in P. J. Willis & Bro. vs. J. H. Cooke.

The defendant J. M. Avery then introduced in evidence a certified copy of judgment rendered by the district court of Galveston county on October 10th, 1879, in favor of P. J. Willis & Brother and against J. H. Cooke for the sum of $1,247.04, with interest thereon from that date at the rate of 12 per cent. per annum, and ordering execution to issue.

Testimony of C. H. Jones.

The defendant J. M. Avery then introduced in evidence the deposition of C. H. JONES, taken June 7th, 1895, who testified as follows:

I reside in Galveston, Texas, and am in the employ of P. J. Willis & Bro. I was acquainted with the firm of P. J. Willis & Bro. in 1879, which consisted of R. S. Willis and several other parties. J. H. Cooke, of Hunt county, Texas, was owing P. J. Willis & Bro. a debt in 1879. It originated in a note, and this note was sued on September 7th, 1879. A judgment was rendered in favor of P. J. Willis & Bro. for $1,247.04, and an abstract of this judgment was recorded in Hunt county. I know about the deed from J. H. Cook and M. E. Cooke, of Hunt county, to R. S. Willis, conveying 126 acres of the James Vivian survey in Kaufman county, dated November 27th, 1879. This deed recites a consideration of $1,200.00 paid, but the real consideration was to settle the indebtedness of J. H. Cooke to P. J. Willis & Brother, and while the deed was taken in the name of R. S. Willis, it was for the benefit of P. J. Willis & Brother. I attach to my deposition herewith several letters from Messrs. Mathews, Neyland &
132 Neyland, attorneys-at-law, of Greenville, Texas, in connection with this matter. Neither P. J. Willis or R. S. Willis paid J. H. Cooke any money in this transaction, but the deed was made for the purpose of settling the indebtedness of J. H. Cooke, as above stated. After Mr. Willis received the deed we had a protracted correspondence with Mr. William Charlton, attorney-at-law, of Terrell, Texas, and Messrs. Mathews, Neyland & Neyland, attorneys-at-law, of Greenville, in regard to the title to the property, which correspondence I attach to my deposition. I know that the indebtedness from J. H. Cooke to P. J. Willis & Bro. was afterwards

paid in another way, as I collected the same on April 10th, 1889. At the time of this last settlement R. S. Willis executed back to J. H. Cooke a quitclaim deed for the 126 acres of the James Vivian survey in Kaufman county, Texas. R. S. Willis is now dead. He died July 20, 1892.

Attached to this deposition and introduced in evidence were certain letters written by Mathews & Neyland, attorneys-at-law, of Greenville, Texas, and which were admitted to have been written by R. R. Neyland, a member of said firm and who is one of the plaintiffs in this suit. One of the letters is dated at Greenville, Texas, March 7th, 1887, and is as follows:

GREENVILLE, TEXAS, *March 4th*, 1887.

Messrs. P. J. Willis & Brother, Galveston, Texas.

GENTLEMEN: Some years ago your Mr. Fields got us to look into your claim against J. H. Cooke, once in judgment. It seems that you settled the matter with him once, receiving certain land in Kaufman county as part payment. When the writer approached Cooke with the execution he produced his receipt in full, and since then we have been trying to get at the bottom of the matter. We today received the inclosed abstract, from which we find that at the time Cooke gave you his deed to the land he did not own a foot of the land, and consequently the receipt was without consideration and void. We suggest that you obtain a decree cancelling the settlement and forward us an execution, and we will make your money for you. The judgment was from *was from* one of your courts and against Cooke. Cooke is now solvent. He is such a consummate scoundrel that we hate to see him successful in
133 his villainous undertakings. The abstract fee, $7.50, or at least we had to pay that for it, and if you intend us to prosecute the matter to the extent of investigating the true status of the land you can remit same to us.

Yours very truly, MATHEWS & NEYLAND.

Another of the letters dated Greenville, Texas, December 31st, 1887, and addressed to P. J. Willis & Bro., at Galveston, Texas, and signed by Mathews & Neyland, is in part as follows:

"Your letter and one from Mann & Baker just to hand. We have seen Mr. Cooke today and he makes the following proposition: He will pay the value of the land at the date of the deed to you, with 8% interest from then until now. He makes the proposition after becoming satisfied with the failure of your title, and he admits the liability on his warranty."

The other letters show the matter settled on this basis.

Testimony of T. F. Lawson.

The defendant J. M. Avery then introduced in evidence the deposition of T. F. LAWSON, taken June 7th, 1895, in which he testified as follows:

I reside in the city of Galveston, Texas. In 1879 I was in the employ of P. J. Willis & Bro. At that time J. H. Cooke, of Hunt county, was indebted to P. J. Willis & Brother in about the sum of $1,200.00 or $1,500.00. I remember the conveyance of 126 acres of land in Kaufman county, Texas, out of the James Vivian survey, made by J. H. Cooke & wife, M. E. Cooke, to R. S. Willis in 1879. There was no cash paid in this transaction; it was intended as a settlement of Mr. Cooke's indebtedness. The conveyance was made to R. S. Willis, and it was afterwards ascertained that no such land as conveyed or described in the deed had any existence or that any title to such land existed in the grantors, and after extended and lengthy correspondence with Mr. Cooke a reconveyance was made by Mr. Willis to Mr. Cooke, and Cooke settled it in some other way.

Testimony of S. M. Fields.

The defendant J. M. Avery then introduced in evidence the deposition of S. M. FIELDS, taken June 15th, 1895, in which he testified as follows:

In 1878 I was in the employ of P. J. Willis & Brother, of
134 Galveston, Texas. At that time J. H. Cooke, of Hunt county, was indebted to said firm about the sum of $1,200.00 or $1,500.00. I afterwards went to see Mr. Cooke about a settlement of this debt, and procured from him a deed made by him and his wife to R. S. Willis, conveying 126 acres of the James Vivian survey, in Kaufman county, Texas. This deed was dated November 27th, 1879, and was made to R. S. Willis, a member of said firm. The consideration for this deed was to settle this indebtedness, and no cash was passed in this transaction, and no cash was paid to Mr. Cooke.

Deposition of J. H. Cooke.

The defendant J. M. Avery then introduced in evidence the deposition of J. H. COOKE, taken February 15th, 1896, in which he testified as follows:

It is not true that at the time this King chattel mortgage sued on was given in May, 1891, that all of the C o o k, O. K. cows in the pasture and on the range were old cows, but, on the contrary, all of said cows were young cows, from two years old up to seven years old. They were not over seven years old at the time the King chattel mortgage sued on was given. At the time this mortgage was given M. E. Cooke had in the pasture and on the range near Payne's store 100 or more cows, with spring (1891) calves following them, not over seven years old. The cows branded C o o k on the left side and O. K. on left hip and marked swallow-fork in the right ear and over and under bit in the left ear—all of these cows were under seven years of age. All of these cows were high-grade and full-blood Durham cows. As I have stated before, at the time the King chattel mortgage sued on was given, M. E. Cooke had 100 or more cows, Durham or part Durham, with spring of

1891 calves following the cows, the cows not over seven years old. The cows were branded C o o k on the left side and O. K. on the left hip, and marked swallow-fork in the right ear and over and under bit in the left ear in the pasture and on the range near Payne's store, Texas.

Testimony of Ed. McDonald.

The witness ED. MCDONALD, being called by the defendant
135 J. M. Avery, testified as follows:

In June, 1893, I lived in Hunt county, about 7 miles southwest of Payne's store. In the spring of that year, and about the time of the levy of the United States marshal, I had bought and sold some cattle down there, and I think I knew the market value at that time. I remember about the marshal's sale of the Cooke cattle in June, 1893. I remember of a bunch of cattle being sequestered by the deputy sheriff and taken over and put in the good pasture. These were cut out by the deputy sheriff, and were afterwards replevied by the defendant J. M. Avery, and were brought back and put with the main herd in the Hale pasture. I saw these cattle, as I helped to bring them back. The cows in that bunch at that time were worth $10.00 per head; the steers in that bunch were worth $12.50, and the heifers in that bunch were worth $8.00 per head.

Upon cross-examination, this witness testified as follows:

At that time I was a farmer, and am still a farmer, but I dealt some in cattle. I expect that I had bought and sold that spring 25 or 30 head of cattle. The last dealings I had was in the spring. I did not keep up with the market after the regular shipping season along about the 1st of June. I did not ship any cattle myself. The cattle I was speaking about buying and selling were range cattle, and had not been fed for the market. I do not know that I would know the market price of cattle in June or July of that year which had been fed or fattened for shipment. I do not think cattle had gone up any after I quit trading in them. I think that cattle that had been fed would be worth more than common range cattle.

Testimony of Dan. E. Teague.

DAN. E. TEAGUE, a witness for the defendant John M. Avery, testified as follows:

I was the constable down at Payne's store in 1893, and know the defendant J. H. Cooke and his wife, M. E. Cooke. I heard about the deed of trust made by Mr. Cooke to Mr. Stegar in 1889.
136 Since that time the property down there was said to belong to his wife, Mrs. Cooke, and she claims it. My understanding is that all the property there belongs to Mrs. Cooke that could be levied on under execution since that deed of trust was made. I was there at the time of the U. S. marshal's sale of the cattle in the case of Avery *vs.* Cooke. At that sale there was nearly 300 head sold; there were about 160 head branded R I P, O. K and the balance branded C o o k, O K. After that sale all of these cattle

were taken down to the Hail pasture, and they were there when the deputy sheriff cut out the cattle which was sequestered. I was raised down in that country and have known Mr. & Mrs. Cooke about 14 or 15 years. It has been my understanding that Mrs. Cooke claimed all these cattle branded C o o k, O K and all these horses branded J. 6 ever since they have lived down there. I think the cattle and horses have been mostly kept in the pasture. I remember about the deputy sheriff coming down there to Payne's store just after the marshal's sale and cutting out about 50 head of cows and some two-year-old steers and two-year-old heifers branded C o o k, and O K. I think the deputy sheriff came there in the night after that sale, and I was over there the next day. The cattle which the deputy sheriff cut out was taken over into another pasture, and after they were replevied by Mr. Avery I helped to bring them back and put them in the same pasture again. I have dealt in cattle down in that country and know the market value of cattle there at that time. The cows in that brand cut out by the deputy sheriff at that time were worth $10 per head and the two-year-old steers were worth $7 per head. There were about sixty-five head of cows branded C o o k, O K. levied on and sold by the United States marshal, and they were all put in the Hail pasture, and afterwards about fifty head were cut out by the deputy sheriff, and put in another pasture called the Tom Good pasture.

On cross-examination by the plaintiff, this witness testified as follows: To the best of my recollection there were sixty-five cows branded C o o k, O K, levied on and sold by the United States marshal. I made a memorandum of the number at the
137 time. I knew the particular bunch of cows, heifers, and steers cut out by the deputy sheriff of Hunt county, as I helped to drive them back. They were a good bunch of cattle mixed up with Durham. They were about the average of cattle down there, though they had been well taken care of. Some of them were fat enough to ship to market and some of them were not. We have all got out cattle down there pretty well graded up and the ordinary selling price of cows there at that time was about $10 per head. Those cattle today might be worth 25 % more than they were at that time.

(To this testimony as to valuation of cattle today the defendant John M. Avery objected on the grounds stated in his bill of exception. The court overruled the objection; to which he excepted.)

On redirect examination, this witness testified as follows: After cows get pretty old they do not increase much in value as they get older. It depends on the condition of the cows whether they would decrease or not.

On further cross-examination by the plaintiffs, this witness further testified as follows: I never had an execution against Mr. Cooke and never had any occasion to investigate his property. It has always been understood that Mrs. Cooke owned the C o o k, O K cattle, and J. 6 horses and mules. Mr. Cooke has owned some jacks and stallions at different times. At one time there was some

cattle there in the Texas brand and the M. E. Cooke brand which I did not understand that Mrs. Cooke claimed. During all the time that Mr. Cooke has lived there he has been buying and selling cattle and horses and was a general trader.

Testimony of W. M. Arnold.

W. M. ARNOLD, a witness for the plaintiffs, testified as follows:

I have dealt some in cattle and was dealing in cattle about June, 1893, and had a general knowledge of the value of cattle about that time. I went down to Payne's store when the cattle was sold there by the United States marshal in June, 1893. I went there with the view of buying some of the cattle and examined them. I think
that the C o o k, O K., cows, which were sold by the marshal,
138 were worth from $10 to $12 per head at that time, and the
two-year-old heifers C o o k, O K., were then worth about $8.00 per head. Half Durham cattle would be worth a good deal more and a good-fed two-year-old half Durham steer would have been worth from $20.00 to $25.00, and half Durham two-year-old heifers $12 to $15, and a half Durham cow would be worth $15 to $25.

Deposition of J. H. Cooke.

The defendant John M. Avery then introduced in evidence the following testimony contained in the deposition of the defendant J. H. COOKE, taken and signed and sworn to by him in this case on January 12th, 1894, to wit:

About May 30th, 1891, I gave a bill of sale to T. H. King for forty cows, nine head of two-year-old steers, twenty-three head of one-year-old steers, 34 head of 2-year-old heifers, and 35 head of 1-year-old heifers, all branded C o o k on the left side and O K on the left hip, and in the pasture and on the range near Payne's store, Hunt county, Texas. About May 26th, I and my wife, M. E. Cooke, gave to T. H. King the chattel mortgage sued on in this case. At the time said chattel mortgage was given I and M. E. Cooke had in the pasture and on the range the cattle mentioned in the bill of sale to T. H. King. The cattle mentioned in the bill of sale to King were marked and branded in the same way as those described in said chattel mortgage. She had at that time one hundred or more such cows and calves there. The cows and calves described in said chattel mortgage were not delivered to T. H. King, and they were kept with and mingled with the other cows and calves in same marks and brands owned by J. H. and M. E. Cooke. At the time the said chattel mortgage to King was given M. E. Cooke had at Payne's store more than ten or 12 mares, with colts following them, branded J. 6 on left shoulder. At said time M. E. Cooke had at Payne's store about 30 head of such mares. At the time said chattel mortgage to King was given the mares and colts described therein were kept with and mingled with the other mares and colts then owned by M. E. Cooke at Payne's store. Eight or ten

of the horses and mules described in said chattel mortgage to
139 King have been sold by me. Such sales were made with the knowledge and consent of T. H. King. Part of the proceeds of such sales were kept and used by me with the consent of said T. H. King. Some of said horses and mules were sold to Pennington, some to Tidwell, and some to other parties. Said sales were made in the winter of 1892. I received about $800.00 from said sales and paid a part of said proceeds to T. H. King; do not remember just how much. The balance was mostly paid by me to R. R. Neyland with the consent of T. H. King. I do not remember how much I used. The land received by my wife from her father was in Kaufman county. This land was sold by her in 1879 or 1880 to a man named Willis. I received the money from Willis through the hands of a man by the name of Fields. No receipt was given. The $500.00 received from her guardian and the $1,500.00 received from Willis is all the money received by my — as her separate property.

Testimony of W. J. Humphreys.

W. J. HUMPHREYS, witness for the defendant John M. Avery, testified as follows:

I live near Payne's store. I was there when the cattle of J. H. Cooke was levied on by the United States marshal. I remember of the deputy sheriff coming down there at that time and taking some cattle out of the bunch. He took them over into another pasture, and I helped to bring these cattle back and turn them into the Hail pasture after they had been replevied by Mr. Avery. I have bought and sold cattle down there and know the market valuation of cattle there. At that time the cows cut out by the deputy sheriff were worth about $10 per head, and the two-year-old steers were worth about $10 per head, and the two-year-old heifers were worth from $7.00 to $8.00 per head.

On cross-examination by plaintiffs, this witness testified as follows:

I know what stock was selling for at that time. Some of these cattle were in good fix and were part Durham, and some of them were fat and ready to be shipped. I think that $10 was
140 about all that those cows could have been sold for at that time, and the steers about $10.00, and the heifers about $7.00 or $8.00. I expect that those cattle today would be worth about 25 % more than they were June, 1893.

(To this testimony as to valuation of cattle today the defendant John M. Avery objected on the ground stated in his bill of exception filed herein; but the — overruled said objections and admitted said testimony; to which said defendant excepted.)

Testimony of Bud McUlmurray.

BUD MCULMURRAY, a witness for the defendant John M. Avery, testified as follows:

I live five or six miles west of Payne's store. I have worked with cattle all my life, and have bought and sold cattle, and have a good idea of the market value of cattle down in that neighborhood. I helped to cut out the cows, two-year-old steers, and two-year-old heifers that were cut out of the bunch by the deputy sheriff after the sale of the cattle down at Payne's store by the U. S. marshal in June, 1893. These were the cattle which were taken by the deputy sheriff under the writ of sequestration. The market value of the cows taken by the deputy sheriff at that time was $10 per head, and the market value of the two-year-old steers at that time was $12 per head, and the market value of those two-year-old heifers at that time was *was* $7.00 per head or $7.50 per head. I think that the horses, mares, and mules levied on and sold by the U. S. marshal at that time were worth about $30.00 per head. Mrs. Cooke is my cousin.

On cross-examination by the plaintiffs, this witness testified as follows:

These mares, horses, and mules would be worth today about $50.00 per head, taking into consideration the increase of growth, &c., and those cattle would be worth today about 25 % more.

(To this evidence of valuation today the defendant John M. Avery objected, as shown by his bill of exceptions; but the court overruled the objection; to which he excepted.)

I saw the cattle that were taken by the deputy sheriff; they were graded cattle, and some of them were in good fix and some
141 were not. I guess they would be valued a little higher than ordinary cattle.

On redirect examination, this witness testified as follows: I think it would be likely that some of the stock would die between June, 1893, and today.

Here the defendant John M. Avery rested. The defendants J. H. & M. E. Cooke did not introduce any testimony.

Testimony of Tom Ellison.

TOM ELLISON, a witness for plaintiffs in rebuttal, testified as follows:

I live about a mile and a half below Payne's store. I am acquainted with Mr. and Mrs. Cooke. I knew what he called his home stock of cattle that was levied on by the United States marshal, but I did not see the cattle which was cut out of the bunch by the deputy sheriff after they were taken out. I was acquainted with the Cooke cattle; they had been bred up and were pretty well mixed with Durham. Taking the cows, two-year-old heifers and steers of the C o o k, O K, cattle brand, that were levied on by

the United States marshal, I think they would be worth about $12.00 per head.

On cross-examination by the defendant John M. Avery, this witness testified as follows: I do not know of any fed steers down there being sold, nor any fed cattle having been sold there about that time. I do not know anything about these particular cattle that were cut out by the deputy sheriff. I had the pasture joining Cooke's, and I saw his stock every day while they were in the Hail pasture. Mr. Tom Good sold some cattle down there the spring before at two cents per pound; they were two-year-old heifers fed on cotton-seed meal and hulls, and were sold at Terrell. Terrell is about 18 miles from Payne's store, and the selling price for cattle is about the same as at Payne's store.

Testimony of Tom Good.

TOM GOOD, a witness for plaintiff-, testified as follows:

In the spring of 1893 I sold two 2-year-old heifers which
142 had been fed for two cents a pound, and they averaged me $13.75 per head. They were sold at Terrell.

On cross-examination by defendant John M. Avery, this witness testified as follows: In the spring of 1893 I sold Mr. Cook two three-year-old steers for $10.00 apiece. I was at Payne's store when the deputy sheriff cut out the cattle sequestered by him; they were taken over to another pasture. I think that the C o o k, O. K., cows cut out by the deputy sheriff at that time were worth $10.00 per head, and the two-year-old steers cut out by him at that time were worth $10.00 per head, and the two-year-old heifers cut out by him at that time were worth $7.00 or $8.00 per head.

On redirect examination by the plaintiff-, this witness testified as follows:

I do not know of any fed cattle being sold in that market in that time. Most of Cooke's cattle were fed and some of them were ready to ship. Those two steers that I sold Cooke had not been fed and were in — bad fix; they would not compare with those that were cut out by the deputy sheriff. Some of the cattle cut out by the deputy sheriff were as good as the ones I sold for two cents per pound. I do not know the market value there at that time for cattle.

Testimony of J. H. Cooke.

J. H. COOKE, one of the defendants and a witness for the plaintiffs in rebuttal, testified as follows: Most of the cattle levied upon by the United States marshal in the spring of 1893 were Durham cattle; some of them were three-fourths and seven-eighths, and some few one-half bloods. They had been well attended to in the preceding winter and spring, and had been fed on cotton-seed meal and hay. I had a conversation with the defendant John M. Avery prior to the levy. I gave him notice of the ownership of the C o o k, O K cattle and R. I. P., O. K. cattle before the levy was made. The United States marshal was also there. Mr. Avery was representing the

plaintiff in that execution; he was the man to whom I gave the notice, and I also gave notice to the marshal before the levy.

143 On cross-examination by the defendant John M. Avery, this witness testified as follows: I told Mr. Avery that Joe Hurst had a bill of sale for 100 head of C o o k, O K cattle. I do not remember whether I told him that these C o o k, O K cattle were in that herd. I told him that Hurst had some there. I told him that all the R I P, O K cattle and 100 head of the C o o k, O K cattle belonged to Mr. Hurst. The deputy marshal and Mr. Avery did not levy on any of the C o o k, O K cattle included in the bill of sale to Hurst.

Testimony of Bob Powell.

BOB POWELL, a witness for plaintiffs in rebuttal, testified as follows: I know Mr. and Mrs. Cooke and Mr. Stegar. I recollect when Mr. Stegar was made trustee down there for Mr. Cooke. I remember the circumstance of Mrs. Cooke buying some cattle from Mr. Stegar. I suppose I branded those cattle that winter and spring. I placed on them the brand "C o o k" on the left side and O K on the left hip. Before that most of them were branded another brand. We estimated that there were about from three to four hundred head that I branded, but I did not brand any horses and mules, but did brand some colts; branded them J. 6, about the same time when I branded the cattle.

On cross-examination by the defendant John M. Avery, this witness testified as follows: Mr. Cooke got me to do the branding. He said that it was his wife's stock. I branded a good many three-year-olds. There was already a good many cattle down there branded C o o k, O K. I branded all kinds of cattle, cows, yearlings, &c. Most of these cattle were in the pasture and some of them were out, but the majority of them were in the pasture. Some of them were bought off of the range. This was after the sale from Mr. Stegar to Mrs. Cooke—a right smart time after that. The branding was done from December up until towards spring. I was there branding about the whole winter. It took me quite a while, as I did not have much help, and we branded some two or three months before we got through. We worked there most all winter.

144–148 On redirect examination by the plaintiffs, this witness testified as follows: There were hands there looking after these cattle and keeping them in the pasture all the time.

We agree that the above and foregoing contains a full, true, and correct statement of all the facts proven on the trial of the above cases, and ask that the same be approved and filed as the statement of facts herein.

CRADDOCK & LOONEY,
Attorneys for Plaintiffs.
COBB & AVERY,
Attorneys for Defendant John M. Avery and His Sureties, C. C. Cobb and H. I. Phillips.

Some of the parties to the above cases not having agreed to the above statement, I hereby certify that the above and foregoing contains a full, true, and correct statement of all the facts proven on the trial of the above cases, and I hereby approve the same and order it filed as the statement of facts herein.

HOWARD TEMPLETON,
District Judge of the 8th Judicial District Court of Texas within and for Hunt County.

Endorsement: Nos. 3406 and 3407. I. Popper & Bro. and R. R. Neyland & Co. *vs.* J. H. Cooke *et al.* Statement of facts. Filed December 7th, 1897. O. S. Moore, clerk.

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149 *Assignment of Errors.*

Filed December 11, 1897.

In the District Court, Hunt County, Texas.

I. POPPER & BRO. and R. R. NEYLAND & Company *vs.* J. H. COOKE ET AL.	Nos. 3406 & 3407. Consolidated Case.

Assignment of errors.

Now comes John M. Avery, one of the defendants herein, and his sureties on his replevy bonds, Chas. C. Cobb and H. I. Phillips, and allege and assign the following errors committed by the district court of Hunt county in the above causes as reasons why the judgment herein should be reversed, to wit:

First Assignment of Error.

The court below erred in finding (No. 6) that the horses and mules involved herein were the separate property of Mrs.
150 M. E. Cooke, and erred in its conclusions of law that plaintiffs were entitled to a foreclosure of a mortgage lien thereon, and erred in rendering its judgment foreclosing said lien thereon, and in rendering any judgment against these defendants, because the evidence showed that said horses and mules were bred and raised by M. E. Cooke and J. H. Cooke and were clearly their community property, even though the mares from which they were bred and raised had been the separate property of the wife, M. E. Cooke.

Second Assignment of Error.

The court below erred in finding that any of the property involved in this suit was the separate property of M. E. Cooke, and erred in holding that plaintiffs are entitled to foreclose a mortgage lien on any of it, and in rendering judgment foreclosing said lien on any of it, and in rendering and judgment against these defend-

ants, because the evidence showed that all of the property was the community property of J. H. Cooke and M. E. Cooke and was not the separate property of M. E. Cooke, and further showed affirmatively that M. E. Cooke had not acquired any separate property or funds by gift, devise, or descent, or otherwise, which had been invested in this property, and further showed that if she ever acquired any such funds it had been invested in lands and not in this property, and the evidence wholly failed to identify and trace any separate funds into this property and wholly failed to clearly and satisfactorily show this was her separate property, as required by law.

Third Assignment of Error.

The court below erred in finding that any of the property involved in this suit was the separate property of M. E. Cooke, and in holding that plaintiffs were entitled to foreclose a mortgage on any of it, and in rendering judgment foreclosing said lien on any of it, and in rendering judgment against these defendants, and said findings and judgment are contrary to the law and the evidence, in this: The evidence showed that Mrs. M. E. Cooke was at all times the wife of J. H. Cooke, and that she claimed the property in-
151 cluded in said mortgage sued on as her separate property under and by virtue of a certain deed of trust executed by J. H. Cooke to C. J. Stegar, trustee, in November, 1889, and by virtue of the purchase of said property by her from said C. J. Stegar, trustee, in November, 1890, and the evidence further showed that in said deed of trust she was preferred to the amount of $5,300.00, which was largely more than said J. H. Cooke owed her at the time, and the said debt was fraudulent and fictitious, and that the property described in said deed of trust was never delivered to said Stegar, trustee, and that said J. H. Cooke remained in possession of said property and sold it after said deed of trust was given, and that said deed of trust was not executed and the proceeds of the property therein were not applied to the payment of the debts therein as directed therein; but said deed of trust was used to transfer the property therein from J. H. Cooke to his wife, M. E. Cooke, so as to shield it from the creditors of the said J. H. Cooke, and said deed of trust was fraudulent and void as against the creditors of the said J. H. Cooke, and was also void because of an insufficient description of the cattle, horses, mules, hogs, etc., therein described, said J. H. Cooke at that time having a great many more similar cattle, horses, mules, etc., besides those reserved by him as exempt property, etc., and consequently no title passed to her by her said purchase from said Stegar as against this defendant, and she also failed to clearly identify and trace the property described in said mortgage so as to make it her separate property.

Fourth Assignment of Error.

The court below erred in its conclusions of fact and law and in rendering said judgment herein, and said judgment is contrary to the law and the evidence, in this: The evidence showed that the

property included in the mortgage sued on, which was sequestered in this case, was the community property of J. H. Cooke and subject to an execution against him, and was not the separate property of his wife, M. E. Cooke, and the evidence showed that at the
152 time the mortgage sued on was given J. H. & M. E. Cooke had a great many more similar cows, calves, horses, mares, and colts and mules of the same age, sex, and breeding, with similar marks and brands to those described in said mortgage, and that all of said stock was kept and mingled together, and that nothing was done to separate and identify the property mortgaged from the other similar property owned by them, and that this condition of affairs continued up to the time the property described in said mortgage was seized under execution against J. H. Cooke, and according to law said mortgage was void as against this defendant.

Fifth Assignment of Error.

The court below erred in rendering judgment herein, and said judgment is contrary to the law and the evidence, in this: The evidence showed that at the time said mortgage sued on was given and ever since said J. H. Cooke was and has ever since remained insolvent, and that this fact was known to T. H. King and the plaintiffs herein, and the property included in said mortgage greatly exceeded in value the debt secured thereby, and after said mortgage was given said J. H. Cooke, with the knowledge and consent of said T. H. King and plaintiffs, sold part of the property mortgaged, and used and appropriated a large part of the proceeds to his own use, and said T. H. King and plaintiffs failed and refused to credit and apply the balance of said proceeds on the mortgage debt, and the plaintiffs in this case now refuse to foreclose said mortgage on any of the property therein except the part levied on under said execution against J. H. Cooke, and they resist the prayer of this defendant to have the balance of said property sold in satisfaction of the debt secured by said mortgage, and they thus evidence their intent to shield all of said property from execution or sale, and, according to law, these facts render said mortgage fraudulent and void as against this defendant.

Sixth Assignment of Error.

The court below erred in granting the two motions to consolidate, filed by the plaintiffs in said two cases of I. Popper & Brother
153 *vs.* J. H. Cooke *et al.* and R. R. Neyland & Company *vs.* J. H. Cooke *et al*, and in consolidating said two cases.

Seventh Assignment of Error.

The court below erred in overruling the motion of Chas. C. Cobb and H. I. Phillips, the sureties upon the replevy bonds herein, to be discharged and to have judgment rendered in their favor after the court had quashed the sequestration proceedings and sequestration bonds, and erred in refusing to quash the replevy bonds herein.

Eighth Assignment of Error.

The court below erred in overruling the motion of John M. Avery to be discharged and to have judgment rendered in his favor after the court had quashed the sequestration proceedings herein and the sequestration bonds, and erred in refusing to quash the replevy bonds herein.

Ninth Assignment of Error.

The court below erred in refusing to quash the replevy bonds herein and in rendering judgment therein against John M. Avery and his sureties on said replevy bonds, because (1) all the other sequestration proceedings and bonds had been quashed, and (2) because the judgment herein was rendered on a new cause of action, first introduced into these cases by plaintiffs' repleader long after the two original suits were brought and sequestration proceedings had and long after said replevy bonds had been given, and said repleader was in effect the institution of a new suit.

Tenth Assignment of Error.

The court below erred in rendering judgment herein against John M. Avery and his sureties on replevy bonds, Chas. C. Cobb and H. I. Phillips, because the evidence as to the value of the property all fixed the value at the time the execution from the United States court was levied and the property sold and the writs of sequestration executed, all of which was in June and July,
154 1893, and said evidence does not relate to the value at the time of this trial, in October, 1897, and the findings of the court as to the values are based on said evidence and fixes the values on said former dates, and said evidence and findings furnish no legal basis on which to render said judgment against said John M. Avery and the sureties on his replevy bonds.

Eleventh Assignment of Error.

The court below erred in overruling the special exception of this defendant, contained in his amended answers, on the ground that he resided in Dallas county and not in Hunt county, and that the district court of Hunt county had no jurisdiction of him in this case, and also in overruling this defendant's plea of personal privilege to be sued in Dallas county, the place of his residence.

Twelfth Assignment of Error.

The court below erred in overruling the special exception of this defendant, contained in his amended answers, wherein he specially excepts to so much of the plaintiffs' repleader and amended petitions herein as alleges that this defendant drove the property sequestered out of Hunt county and converted same to his own use, because this is a new and distinct cause of action against this defendant

alone, arising after the institution of this suit, and because such cause of action for damages against this defendant alone cannot be joined in this suit with the cause of action on the note and mortgage sued on, and for foreclosure of said mortgage and sequestration of the property.

Thirteenth Assignment of Error.

The court below erred in its findings as to the value of the stock involved in this suit, and erred in its judgment against Avery, Cobb, and Phillips for $850.00 based thereon, (1) because said findings do not give the date when said values existed, and (2) because the evidence showed that the animals involved were not worth over the following values, viz: Cows, $10.00 per head; horses, $30.00
155 per head; mules, $30.00 per head; 2-year-old steers, $10.00 per head, and 2-year-old heifers, $7.00 per head, and said findings and judgment are excessive, and (3) because said findings and judgment values the two horses at $50.00 each, while the highest value placed on them by the evidence was $50.00 for one and $40.00 for the other, and said finding and judgment is clearly excessive to this extent.

Fourteenth Assignment of Error.

The judgment rendered herein is erroneous in that it does not fix the value of each article of the property sequestered and replevied herein by this defendant, as is required by law in such cases; but the judgment only fixes the total value of all of said property.

Fifteenth Assignment of Error.

The court erred in rendering judgment herein, and said judgment is contrary to the law and the evidence, in this: The evidence showed that an execution had been levied on the cattle, horses, and mules sequestered in this case, and that this defendant has a lien thereon by virtue thereof, and that there was also a large amount of other property included in said mortgage which was still in existence and located at Payne's store, Hunt county, Texas, and the court erred in refusing to foreclose said mortgage on said other property and ordering it to be first sold in satisfaction of this judgment, as prayed for by this defendant.

Sixteenth Assignment of Error.

The court below erred in postponing and refusing to consider the motion of these defendants, Avery, Cobb, and Phillips, to tax certain costs against the plaintiffs and their sureties herein, as shown by said motion on file herein, and also erred in not deciding the amount and items of costs to be taxed against plaintiffs, and in not requiring plaintiffs to pay said costs as a condition precendent
156 to the prosecution of this suit, as prayed for in said motion, and the court below erred in overruling in part the motion of these defendants, Avery, Cobb, and Phillips, to tax certain costs

against the plaintiffs and their sureties herein, as shown by said motion on file amongst the papers in this case, and in not deciding the amount and items of costs to be taxed against the plaintiffs.

Seventeenth Assignment of Error.

The court below erred in rendering judgment against these defendants because the evidence showed that the cause of action and note sued on in this case was barred by the statute of limitation of four years, as pleaded by these defendants.

Eighteenth Assignment of Error.

The judgment herein was erroneous and void as to all of the defendants herein.

Nineteenth Assignment of Error.

The court below erred in rendering its judgment herein against these defendants because the judgment herein is contrary to the law and the evidence, in that the pleadings and the evidence showed that all the property sued for was legally levied upon by the United States marshal for the northern district of Texas under a valid execution issued from the United States circuit court for the northern district of Texas, at Dallas, based on a valid judgment rendered by said court, and was legally levied upon and sold thereunder, and the mortgage sued on was void as against said execution and the purchaser thereunder, and the judgment rendered herein fails to give full force and effect to said execution, levy, and sale and the acts of the marshal thereunder, and is against the right, title, commission, and authority, privileges and immunity specially set up and claimed by these defendants under said execution and the laws of the United States and the judgments and courts thereof.

COBB & AVERY,
Attorneys for the Defendants John M. Avery, C. C. Cobb, & H. I. Phillips.

157–159 Endorsements: I. Popper & Bro. & R. R. Neyland & Co. *vs.* J. H. Cooke *et al.* Assignment of errors. Filed Dec'r 11, 1897. O. S. Moore, clerk.

* * * * * * *

160 *Opinion of the Court of Civil Appeals.*

APRIL 13, 1898.

JOHN M. AVERY ET AL., Appellants, *vs.* I. POPPER & BRO. ET AL., Appellees. } No. 1503. Appeal from the District Court of Hunt County.

On June 29, 1893, I. Popper & Bro. brought a suit in the district court of Hunt county against J. H. and M. E. Cooke, W. W. Avery, and John Avery to recover of J. H. and M. E. Cooke the sum of

$775, with interest upon the note described in our conclusions of fact, and to foreclose against all of defendants a mortgage on the property described in our conclusions of fact.

On the same day R. R. Neyland & Co. brought a separate suit against the same parties to recover the balance due on said note after deducting the amount for which Popper & Bro. sued,
161 and likewise to foreclose said mortgage. In each suit a writ of sequestration was sued out against W. W. and J. M. Avery, the property seized and replevied, as shown in our conclusions of fact.

On the 16th day of January, 1894, motions made in each case by defendant John M. Avery to quash the sequestration proceedings were overruled, and on the same day, on application of plaintiffs in each case, they were consolidated.

None of the defendants except J. M. Avery filed answers.

After the two cases were consolidated the plaintiffs filed an amended petition, in which, in addition to the matters plead in their several petitions in the original suits, they alleged the issuance and levy of the writs of sequestration, the replevy of the property by J. M. Avery, and that afterwards Avery had moved the property out of Hunt county and converted it to his own use; that they claimed a mortgage lien upon the property in controversy, and that if the court should hold that the mortgage did not cover any specific stock they had a right to elect and did elect to claim the property involved herein. In the amended pleadings, after the consolidation, W. W. Avery was not continued as a party to the suit.

In his answer J. M. Avery plead in abatement the privilege of being sued in Dallas county, in which he alleged his residence was, in so far as the suit was based upon the alleged conversion of the property in him. He excepted to the amended petition upon the ground that the partial transfer of the notes could not be made and separate suits brought and maintained thereon. In his answer to the merits he alleged the purchase of the property under an execution issued against J. H. Cooke, shown in our conclusions of fact; that the mortgage sought to be foreclosed was void for want of sufficient description of the property, because at the time it was given J. H. and M. E. Cooke had a great many more similar stock, which were kept and mingled with the stock mortgaged; that the mortgage included a great many more stock besides those seized and purchased by him under execution and sequestered in
162 the consolidated suits, and prayed that the mortgage be foreclosed on all the stock and the other stock sold first. He also plead that the mortgage was fraudulent and void, and that J. H. Cooke was insolvent when it was given and had ever since remained so, and it was with the knowledge and consent of T. H. King and plaintiffs that J. H. Cooke had sold some of the mortgaged property and appropriated the proceeds to his own use. He also plead *that* the statute of limitation of four years, and that the debt sued on had been in part paid.

In a supplemental petition the plaintiff- alleged that the property

mortgaged to secure the note was the separate property of Mrs. M. E. Cooke, who was the wife of J. H. Cooke; that it all being her separate property, the defendant had no right to demand that the mortgage on the property not involved in this suit should be foreclosed.

On the 26th day of October, 1897, the case was tried by the court without a jury, and the plea in abatement filed by J. M. Avery was overruled, all the sequestration proceedings quashed, except the replevy bonds, costs of sequestration taxed against the plaintiffs, and judgment was rendered in favor of I. Popper & Bro. against J. H. Cooke for the sum of $1,630, with interest thereon from date of judgment at the rate of 12 % per annum, and in favor of R. R. Neyland against J. H. Cooke for the sum of $1,774, with interest from date of judgment at the rate of 12 % per annum, together with a foreclosure of the mortgage as against J. H. Cooke and wife, M. E. Cooke, upon all the property described in our conclusions of fact, except the 50 calves. Judgment was also rendered in favor of plaintiffs against J. M. Avery and the sureties on his replevy bond for $850, together with 6 % interest thereon from date of judgment. No personal judgment was rendered against Mrs. M. E. Cooke. From which judgment J. M. Avery and the sureties on his replevy bond have appealed.

On this appeal the appellees have filed cross-assignments of errors.

Conclusions of Fact.

On May 26, 1891, J. H. Cooke and his wife, M. E. Cooke, executed and delivered to T. H. King their joint and several
163 promissory note for $1,940, payable on the 1st day of November thereafter, with interest from January 1st, 1891, at the rate of 12 % per annum. The note provided for 10 % attorney's fee if placed in the hands of an attorney for collection.

On the 10th day of April, 1892, the payee, T. H. King, transferred without recourse to I. Popper & Bro. an interest of $775.00 in said note, with interest thereon at the rate expressed in the note from its date. At the same time said payee transferred without recourse the balance of said note, principal and interest, to R. R. Neyland under the firm name of R. R. Neyland & Co.

To secure the payment of said note, the makers thereof on May 26, 1891, executed and delivered to T. H. King their chattel mortgage whereby they conveyed to him, among other property, 50 cows with their spring calves (spring of 1891), cows branded *Cook* on left side and AK on left hip, the calves at the time not branded; also one bay mare colt, one bay horse colt, and one black mule colt. This instrument was filed and duly registered as a chattel mortgage in the chattel mortgage register of Hunt county, Texas, in which the mortgagors resided and the property situated, on May 30, 1891.

On June 14th, 1893, the United States marshal, by virtue of an execution issued on June 9, 1893, out of the United States circuit court of Dallas on a judgment therein rendered in favor of W. W. Avery and against J. H. Cooke and sureties on his sequestration

bond, but not against his wife, said sureties being O. Hail and Wm. Hodges and J. M. Johnston, levied upon the property above described. The levy was made in Hunt county by direction of J. M. Avery, the attorney of W. W. Avery. All of said property was on June 28, 1893, by virtue of said execution, sold by the United States marshal in Hunt county, Texas, at public outcry, and was bid in by J. M. Avery in the name of W. W. Avery, the amount of the bid being credited upon the execution, and all of the property was then delivered by the marshal to J. M. Avery, the attorney of W. W. Avery.

On June 29, 1893, I. Popper & Bro. and R. R. Neyland & Co. filed separate suits against J. H. & M. E. Cooke, W. W. and J. M. Avery, to recover of the makers of the note above described
164 the amounts respectively due them by reason of the transfer of said note by the payee, and to foreclose the mortgage given to secure the note upon the property above described. The property was seized while in possession of J. M. Avery by virtue of writs of sequestration issued in these suits. After such seizure J. M. Avery replevied and resumed possession of the property, Chas. C. Cobb and H. I. Phillips being the sureties on his replevy bond. After J. M. Avery replevied the property he drove it out of Hunt county, Texas, and within a short time thereafter sold and disposed of all of it. He had none of said property on hand when this suit was tried in the court below, and would have been wholly unable to produce said property or any part thereof in satisfaction or partial satisfaction of the judgment rendered in said court.

At the time the mortgage was executed to secure the note, there were many more animals of the same description mingled with those upon which the mortgage was given, but the evidence is sufficient to show that just prior to the execution of the mortgage the animals embraced in it were pointed out to Mr. Neyland, who represented King in taking the mortgage security and drafting the mortgage. But the animals covered by the mortgage were not separated from the others of the same description with which they were mingled, nor was there such separation when the execution in favor of Neyland was levied upon the property in controversy.

The evidence is reasonably sufficient to show that the 50 head of cows described in the mortgage, as well as all others of like description mingled with them, were the separate property of Mrs. M. E. Cooke at the time the mortgage was executed, and continued to be her separate property until disposed of by Mr. Avery. The 50 calves were calved during the marriage of J. H. Cooke and wife, after the cows became the separate property of Mrs. M. E. Cooke, and were therefore, when the mortgage was given and the execution in favor of Avery levied upon, community property of J. H. and M. E. Cooke. The horses and mules involved in this suit were the offspring of the separate property of M. E. Cooke during her marriage with J. H. Cooke, and were likewise the community property of
165 J. H. Cooke and wife at the time the mortgage was given and the writ of execution in favor of Avery levied upon same.

From the view we take of the case, which will be shown in our

conclusions of law, we do not deem it necessary to pass upon the questions as to whether or not the deed of trust made on the 15th day of November, 1889, by J. H. Cooke to J. E. Stegar, through which Mrs. M. E. Cooke claims the property mortgaged to secure the debt sued on, was fraudulent; but if we deemed the question essential to a proper disposition of this case, we should find that the testimony is reasonably sufficient to show that such deed of trust was made by J. H. Cooke for the purpose of securing his creditors, among whom was his wife, M. E. Cooke, and that the value of the property did not exceed the indebtedness it was transferred to secure.

The finding of the trial court, which is sustained by the evidence, as to the value of the property in controversy is as follows: "Cows, $13.00 per head; horses, $50.00 per head; mules, $75.00 per head; 17 2-year-old past steers, $12.00 per head, and 33 2-year-old past heifers, $10.00 per head," aggregating 1,384.00.

Excluding the property sequestered, upon which the mortgage is sought to be foreclosed, the remainder of the property covered by the King mortgage was in June or July, 1893, worth $700. Since that time some of the stock not sequestered have died and some strayed, so that those left on hand when the suit was tried in the court below did not exceed in value the sum of $200.00.

When the suits, which were consolidated, were instituted the appellant J. M. Avery resided in Dallas county and has resided in that county continuously ever since that time.

The evidence is insufficient to show the mortgage given to secure the note sued on was fraudulent, or that the property exceeded in value the debt it was mortgaged to secure.

Conclusions of Law.

The facts show, as we have found, that the horses and mules involved in this suit were the community property of J. H.
166 and M. E. Cooke. From this it follows that the court erred in holding that such property was the separate property of the wife. We also found such facts as constitute the 50 calves involved in this suit the community property of J. H. Cooke and wife, which last finding is contrary to the finding of the trial court. The questions raised by the assignments of the appellant and cross-assignments of appellee is whether such community property passd to W. W. Avery by virtue of the execution sale free from the mortgage sought by the appellee to be foreclosed. The court below seems to have proceeded upon the theory that the title acquired by Avery by virtue of the execution sale of the community property was superior to the mortgage made by Cooke and wife to secure the note sued on, and that therefore the appellees were not entitled to foreclosure upon the community property embraced in the mortgage. It will be observed that the mortgage was executed by both the husband and wife, and it seems to us that, if valid, it was a lien upon all the property embraced in it, whether separate or community. The question, then, is as to the validity of the mortgage.

We have found as a fact that the evidence was not sufficient to show that the mortgage was not fraudulent. Upon its face it appears to be valid, but the contention is that as there were other animals of the same kind and description belonging to the mortgagors mingled with those covered by the mortgage which had not been separated from the property in controversy at the time they were levied upon by the United States marshal, that the mortgage was invalid or inoperative as to the plaintiff in the execution by virtue of which such levy was made. This contention seems to have been upheld by the court of civil appeals of the fifth district upon a former appeal in this case, upon the facts as then presented to it, but it seems that there was no evidence then before that court showing that the property mortgaged had been pointed out to the agent of the mortgagee at the time of or just prior to its execution. However such designation might affect a *bona fide* purchaser for value without notice, it would be good as between the parties to the mortgage, so long as the property designated could be iden-
167 tified and separated from other property of mortgagors with which it was mingled, and its effect would be the same between the mortgagee and a third party whose attitude to the property is not better than the mortgagor's. Even if the designation of the animals mortgaged were insufficient to identify them and there had been no designation at all, the mortgage would have been good between the parties upon the authority that a mortgage conveying a number of animals in a certain brand when the mortgagor owns a much larger number of animals of the same description in the same brand, and there is no means to determine which ones were intended to be mortgaged, it is not void from uncertainty, because the mortgagee has an implied power to elect as to which animals shall be deemed included in the mortgage. Oxsheer *vs.* Watt, 41 S. W. Rep., 466. This right of election was exercised by the mortgagees when they sued to foreclose the mortgage on the animals in controversy and sequestered them while in appellant's possession. A creditor who purchases at his own sale and credits the amount of his bid on the execution is not a purchaser for value and can occupy no better position than the mortgagors. Ayres *vs.* Duprey, 27 Tex., 606. When the levy upon the property in controversy was made by the United States marshal under direction of appellant the mortgage sought to be foreclosed had been duly registered, and the appellant had constructive notice not only of its contents, but of the rights which legally attached to the mortgagee under and by virtue of said mortgage, and he knew that if the appellees had not exercised their right of election that such right still existed, and that a levy and sale of the property would be subject to the right of the mortgagee to select from the cattle and horses of the mortgagors of the same description of those mortgaged the number and kind of animals described in the mortgage, and that he nor his assignees could be deprived of this right by the levy and sale of the property under execution.

From these conclusions it follows that the error of the court in finding that the horses and mules in controversy were the separate

property of the wife did not prejudice the appellant, and that the error in finding that the calves were community property
168 prejudiced the appellees to the extent of their value, which they had the right to recover.

There is no evidence tending to show that the debt which the mortgage was given to secure was fictitious or the mortgage fraudulent, and as the mortgage was made by J. H. Cooke and his wife, and was a lien upon the property, whether it was separate or community, it was immaterial whether the deed of trust made by J. H. Cooke to Stegar, under which M. E. Cooke claims the animals as her separate property, was fraudulent or not. It is therefore unnecessary for us to give further consideration to those assignments which call in question the validity of the Stegar deed of trust or the right of M. E. Cooke to the animals as her separate property.

We have found, as a matter of fact, that the property included in the mortgage did not exceed in value the debt it was given to secure. Therefore the principle invoked that a chattel mortgage of property exceeding the value of the debt cannot release a portion thereof for the debtor's benefit and assert his lien thereon against a subsequent attaching creditor has no application in this case. Nor was the appellant prejudiced by the failure of the court to compel the appellees to foreclose on the other property mortgaged, and have it sold and the proceeds applied to the payment of the judgment against the Cookes before selling the property involved in this suit. Because, as we have found, the entire mortgaged property on hand at the time the property in controversy was seized under Avery's execution was of far less value than the amount due on the note sued for, it would have been of no benefit to the appellant to have had securities marshalled which were insufficient to discharge the prior mortgage lien held by appellees.

The evidence is sufficient to show the value of the property at the time of the trial was as found by the trial court, and the value so found relates to that time and not to the time the property was levied upon by the United States marshal or when the writs of sequestration were issued. Therefore the contention of Avery that judgment should not have been entered against him and his sureties because the evidence fixed the value of the property at
169 the time the execution from the United States court was levied and the property sold and writs of sequestration executed is not sustained by the record and cannot be maintained.

As the appellant J. M. Avery had none of the property on hand when the case was tried in the court below, and would have been wholly unable to produce said property or any part thereof in satisfaction or partial satisfaction of any part of the judgment rendered therein, he nor the sureties on his bond were prejudiced by the failure of the judgment to fix the value of each article of property sequestered and replevied. Appellants, having placed it out of their power to produce any part of the property in satisfaction or partial satisfaction of the judgment, should not be heard to complain of the court's failure to fix the value of each item of the property when they failed to request that the judgment should be so entered, or to

complain of the judgment on that account in the court below. The value per head of the respective kinds of animals sequestered is found by the court, and these values would have doubtless been stated in the judgment if appellants had indicated to the court the desire to have the judgment so entered.

The separate suits originally filed by the appellees embraced identically the same cause of action that was involved when they were consolidated, and had not J. M. Avery, after replevying the property sequestered, driven it from Hunt county and sold it the cause of action would have remained the same from the time the original suits were instituted to the time the final judgment was rendered in the court below; but in each of the original suits there was a defect of parties plaintiff, in that, as the plaintiffs in each owned interests in the note sued on, they should have joined as plaintiffs in one suit to recover their respective interests. This defect was cured by the consolidation and amendment of their pleadings, the cause of action and parties remaining the same as in the original suits. The effect of the sequestration proceedings in the separate suits was the same as if only one suit had been brought on their cause of action by the plaintiffs. Such proceedings we do not believe are void by reason of such defect in parties. The affidavit and bonds, writs of sequestration—in fact, all the sequestration
170 proceedings—were in compliance with law, and when the defect of parties was cured by consolidation of the cases and amendment to the pleadings of plaintiffs it related back to the time the separate suits were filed and left the sequestration proceedings in full force and effect. The court, therefore, in our opinion, erred in quashing the writ of sequestration and adjudging the costs of such proceedings against the appellees. But as only one suit should have been brought in the first instance, we think that the amount that accrued as costs in one of the original suits up to the time they were consolidated should have been taxed against the plaintiffs.

If it should be conceded that the writs of sequestration were properly quashed, the replevy bond of appellants would still be binding upon them. Beemis *vs.* Wells, 31 S. W., 857; Cahn *vs.* Jaffrey, 34 S. W., 372; Filgo *vs.* Citizens' National Bank, 38 S. W., 237.

There is no merit in appellants' assignment of error which complains of the judgment upon the ground that plaintiffs' cause of action was barred by the statute of limitation.

Since John M. Avery and the sureties on his replevy bond were liable for the value of the property sequestered, and were so adjudged, it is unnecessary for us to pass upon the point raised by the appellants' 12th assignment of error, in which it is contended that the court should have sustained an exception to so much of plaintiffs' amended petition as sought to recover judgment against John M. Avery for a conversion of the property, upon the ground of misjoinder of actions.

The judgment of the district court in favor of appellees against J. M. Cooke and wife will be affirmed, and the judgment of the district court against J. M. Avery and the sureties on his replevy

bond for $850 will be likewise affirmed, and in addition to said amount judgment will be here rendered against the said Avery and his said sureties for the sum of $534, the value of the 17 two-year-old steers and the 33 two-year-old heifers found by the trial court, with interest thereon from the date of judgment of the district court at the rate of 6% per annum. The judgment
171 of the district court against appellees for all costs created by reason of the institution and suing out of the writs of sequestration will be set aside and judgment here entered against said appellees for the amount of costs that accrued in one of the original suits up to the time it was consolidated with the other, and the costs of this appeal will be adjudged against appellants.

Reformed and affirmed.

H. H. NEILL,
Associate Justice.

Endorsed: No. 1503. J. M. Avery *et al.*, appellants, *vs.* I. Popper & Bro. *et al.*, appellees. Opinion. Filed in the court of civil appeals at San Antonio, Texas, Apr. 13, 1898. H. E. Hildebrand, clerk.

Judgment of the Court of Civil Appeals.

WEDNESDAY, *April* 13, *A. D.* 1898.

JOHN M. AVERY ET AL., Appellants, *vs.* I. POPPER & BRO. ET AL., Appellees. } No. 1503. Appeal from District Court of Hunt County.

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this court that there was error in the judgment of the court below in not rendering judgment in favor of appellees, I. Popper & Bro. and R. R. Neyland, against appellants for $534.00 additional, and in rendering judgment against appellees, I. Popper and E. Popper and R. R. Neyland, and their sureties on sequestration bonds, W. H. Bush and S. J. Mason, for all costs occasioned by the sequestration proceedings, it is therefore considered, adjudged, and ordered that the judgment of the court below, in so far as it adjudged all costs of the sequestration proceedings against said appellees, I. Popper and E. Popper and R. R. Neyland, and their sureties, W. H. Bush and S. J. Mason, be reversed, and this court proceeding to render such judgment as should have been rendered in the court below:

It is ordered, adjudged, and decreed that appellees, I.
172-216 Popper and E. Popper and R. R. Neyland, pay all costs in cause No. 3406, styled I. Popper & Bro. *vs.* J. H. Cooke *et al.*, in the district court of Hunt county, Texas, up to the time that said cause was consolidated with cause No. 3407, styled R. R. Neyland & Co. *vs.* J. H. Cooke *et al.*, in the district court of said county, and it is further ordered that appellants, John M. Avery, Charles C. Cobb, and H. I. Phillips, pay all other costs in the court below.

It is further ordered, adjudged, and decreed that the appellees, I Popper and E. Popper and R. R. Neyland, do have and recover of

and from the appellants, John M. Avery, Charles C. Cobb, and H. I. Phillips, the sum of five hundred and thirty-four dollars, with interest thereon from October 26, 1897, at the rate of 6 per cent. per annum, and this sum shall be in addition to the amount adjudged by the court below and shall be divided between said appellees in the same proportion as is provided for in the judgment of the court below for the division of the amount adjudged by the court below, and because this court is of the opinion that there was no other error in the judgment of the court below, it is therefore further considered, adjudged, and ordered that the judgment of the court below be in all things affirmed; that the appellees, I. Popper, E. Popper, and R. R. Neyland, do have and recover of and from the appellants, John M. Avery, Charles C. Cobb, H. I. Phillips, and their sureties, R. B. Robinson and W. M. Alexander, the amount adjudged by the court below and all costs of this appeal and this decision be certified below for observance.

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217 *Order Granting Petition for Writ of Error.*

OCTOBER 20, 1898.

J. M. AVERY ET AL. *vs.* I. POPPER & BRO. ET AL. } App. 1920. From Hunt County, Fourth District.

This day came on to be heard the application of J. M. Avery *et al.* for a writ of error to the court of civil appeals for the fourth supreme judicial district, and the same having been duly considered, it is ordered that said application be granted and the writ of error issue as prayed for.

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218 *Opinion of Supreme Court.*

Filed December 19, 1898.

JOHN M. AVERY ET AL. *vs.* I. POPPER & BRO. ET AL. } No. 720. From Hunt County, Fourth District.

I. Popper & Brother filed a suit in the district court of Hunt county on June 29, 1893, against J. H. and M. E. Cooke, W. W. Avery and John M. Avery to recover $775 of a note made by J. H. and M. E. Cooke to T. H. King, dated on May 26, 1891, due on the 1st of November, 1891, and interest thereon, and R. R. Neyland & Co., consisting of R. R. Neyland, filed suit in the same court on the same day against the said parties to recover of the said M. E. Cooke and J. H. Cooke the balance of the same note, and in each case the plaintiff sought to foreclose a mortgage upon property hereinafter described, which was alleged to be in the possession of W. W. and J. M. Avery. The two suits were consolidated and the case tried before the judge without a jury, who rendered judgment in favor of the plaintiffs, each for his proportion of the note and interest,

against J. H. and M. E. Cooke, and against J. M. Avery and his sureties on a replevy bond for the value of fifty cows, one bay mare colt, one bay horse colt, and one black mule colt. Upon appeal the judgment was reformed and rendered in favor of the plaintiff for the amount adjudged by the court below and for the further sum of $534.

We copy the conclusions of fact of the court of civil appeals as follows: "On May 26, 1891, J. H. Cooke and his wife, M. E. Cooke, executed and delivered to T. H. King their joint and several promissory notes for $1,940, payable on the 1st day of November thereafter, with interest from January 1st, 1891, at the rate of 12 per cent. per annum. The note provided for ten per cent. attorney's fee, if placed in the hands of an
219 attorney for collection. On the 10th day of April, 1892, the payee, T. H. King, transferred without recourse to I. Popper & Bro. an interest of $775 in said note, with interest thereon at the rate expressed in the note from its date. At the same time said payee transferred without recourse the balance of said note, principal and interest, to R. R. Neyland, under the firm name of R. R. Neyland & Co. To secure the payment of said note, the makers thereof, on May 26, 1891, executed and delivered to T. H. King their chattel mortgage, whereby they conveyed to him, among other property, 50 cows, with their spring calves (spring of 1891)—cows branded 'Cook' on the left side and 'AK' on left hip; the calves at the time not branded; also one bay mare colt, one bay horse colt, and one black mule colt. This instrument was filed and duly registered as a chattel mortgage in the chattel mortgage register of Hunt county, Texas, in which the mortgagors resided and the property was situated, on May 30, 1891. On June 14, 1893, the United States marshal, by virtue of an execution issued on June 9, 1893, out of the United States circuit court of Dallas on a judgment therein rendered in favor of W. W. Avery and against J. M. Cooke and sureties on his sequestration bond, but not against his wife, said sureties being O. Hail and William Hodges and J. M. Johnston, levied upon the property above described. The levy was made in Hunt county by direction of J. M. Avery, the attorney of W. W. Avery. All of said property was, on June 28, 1893, by virtue of said execution, sold by the United States marshal in Hunt county, Texas, at public outcry, and was bid in by J. M. Avery in the name of W. W. Avery, the amount of the bid being credited upon the execution, and all of the property was then delivered by the marshal to J. M. Avery, the attorney of W. W. Avery. On June 29, 1893, I. Popper & Brother and R. R. Neyland & Co. filed separate suits against J. H. and M. E. Cooke and W. W. and J. M. Avery to recover of the makers of the note above described the amounts respectively due them by reason of the transfer of said note by the payee and to foreclose the mortgage given to secure the note upon the property above described. The property was seized while in possession of J. M. Avery by virtue of writs
220 of sequestration issued in these suits. After such seizure J. M. Avery replevied and resumed possession of the

property, Chas. C. Cobb and H. I. Phillips being the sureties on his replevy bond. After J. M. Avery replevied the property, he drove it out of Hunt county, Texas, and within a short time thereafter sold and disposed of all of it. He had none of said property on hand when this suit was tried in the court below, and would have been wholly unable to produce said property, or any part thereof, in satisfaction or partial satisfaction of the judgment rendered in said court. At the time the mortgage was executed to secure the note there were many more animals of the same description mingled with those upon which the mortgage was given, but the evidence is sufficient to show that just prior to the execution of the mortgage the animals embraced in it were pointed out to Mr. Neyland, who represented King in taking the mortgage security and drafting the mortgage; but the animals covered by the mortgage were not separated from the others of the same description with which they were mingled, nor was there such separation when the execution in favor of Neyland (Avery) was levied upon the property in controversy. The evidence is reasonably sufficient to show that the 50 head of cows described in the mortgage, as well as all others of like description mingled with them, were the separate property of Mrs. M. E. Cooke at the time the mortgage was executed, and continued to be her separate property until disposed of by Mr. Avery. The 50 calves were calved during the marriage of J. H. Cooke and wife, after the cows became the separate property of Mrs. M. E. Cooke, and were therefore, when the mortgage was given and the execution in favor of Avery levied, community property of J. H. and M. E. Cooke. The horses and mules involved in this suit were the offspring of the separate property of M. E. Cooke during her marriage with J. H. Cooke, and were likewise the community property of J. H. Cooke and wife at the time the mortgage was given and the writ of execution in favor of Avery levied upon same. From the view we take of the case, which will be shown in our conclusions of law, we do not deem it necessary to pass upon the question as to whether or not the deed of

221 trust made on the 14th day of November, 1889, by J. H. Cooke to J. E. Steger, through which Mrs. M. E. Cooke claims the property mortgaged to secure the debt sued on, was fraudulent; but if we deemed the question essential to a proper disposition of this case we should find that the testimony is reasonably sufficient to show that such deed of trust was made by J. H. Cooke for the purpose of securing his creditors, among whom was his wife, M. E. Cooke, and that the value of the property did not exceed the indebtedness it was transferred to secure. The finding of the trial court, which is sustained by the evidence, as to the value of the property in controversy, is as follows: 'Cows, $13.00 per head; horses, $50.00 per head; mules, $75.00 per head; 17 2-year-old past steers, $12.00 per head, and 33 2-year-old past heifers, $10.00 per head;' aggregating $1,384. Excluding the property sequestered, upon which the mortgage is sought to be foreclosed, the remainder of the property covered by the King mortgage was in June or July, 1893, worth $700. Since that time some of the stock not sequestered

have died and some strayed, so that those left on hand when the suit was tried in the court below did not exceed in value the sum of $200. When the suits which were consolidated were instituted the appellant J. M. Avery resided in Dallas county, and has resided in that county continuously ever since that time. The evidence is insufficient to show the mortgage given to secure the note sued on was fraudulent, or that the property exceeded in value the debt it was mortgaged to secure."

The judgment of the district court quashing the writs of sequestration issued in the separate suits originally instituted by the plaintiffs in this case was not reversed by the court of civil appeals, and no complaint is made in this court by the defendants in error of that action of the district court. In considering all questions growing out of the quashing of those writs that order will be treated as correctly rendered and the writs properly quashed.

When the district court quashed the writs of sequestration in the original cases the replevy bonds given by J. M. Avery and
222 his sureties, Cobb and Phillips, fell with the writs upon which they were based, and the district court erred in entering judgment against Avery and his sureties on the replevy bonds (Mitchell & Company *vs.* Bloom & Company, 91 Tex., 634).

At common law, a part of a debt could not be assigned. Such assignment was void, and passed no title or right whatever in the claim, and, of course, no action could be maintained by the assignee of a portion of a claim. But in equity such assignments are sustained, and it is now the established doctrine in this State that a claim may be assigned in parts to different persons, each of whom acquires a right to so much of the common fund, and is entitled to maintain an action thereon against the debtor (Harris County *vs.* Campbell, 68 Tex., 22; Clark *vs.* Gillespie, 70 Tex., 513; Johnson *vs.* Amarillo Improvement Co., 88 Tex., 505). The proceedings in the separate suits instituted by Popper & Bro. and Neyland were not void in their beginning, but were improperly brought, because they should have joined in one action, and, failing to do so, Popper & Bro., who filed the first suit, should have made Neyland a defendant, or the latter might have intervened in that suit. The debtors, J. H. and M. E. Cooke, could have forced consolidation of the cases but they made no objection, and we doubt if Avery had a right to complain. However, the most that he could claim is that he should not be charged with the costs unnecessarily incurred by prosecuting two suits instead of one, and this protection he has received by the judgment of the court of civil appeals.

It is claimed that the mortgage sought to be foreclosed in this case is void (1) because it was an attempt to mortgage a part of a larger number of cows without separating or designating the particular cows, and (2) if valid as between the parties, it is not good as against execution creditors.

The marks and brands designated the herd of the mortgagors as the group which included the cows and calves mortgaged, but being a part of a larger number of the same description, and not having

been separated nor identified, no lien attached to any par-
223 ticular animals in the herd. The question is, do the terms of the mortgage, construed in the light of the attending circumstances, confer upon the mortgagee any right in the herd of cattle? When the mortgage was made the mortgagors owned in Hunt county more than one hundred cows with calves following them, branded and marked as described in that instrument, which was known to the mortgagee King at the time, and the evidence and the findings of fact do not show that the mortgagors had any similar cattle outside of that herd. J. H. and M. E. Cooke executed the mortgage for the purpose of securing the payment of a debt owing by them to King, and, in order to accomplish that purpose, empowered King, in case of default in the payment of the debt, to sell the cows and calves at the court-house door in Greenville, Hunt county, and to apply the proceeds to the payment of their indebtedness to him.

In the light of these facts the mortgage must be interpreted by applying to it the following rules of law: 1. Its terms must be construed most strongly against the makers. 2. Effect must be given to the intent of the parties. 3. The law presumes that the mortgagors intended to confer some benefit upon the mortgagee. 4. Authority will be implied to do everything necessary to the execution of an express power.

As we have seen, no right attached under the mortgage to specific animals, nor did it give a lien upon an undivided interest in the herd. The power was given to sell certain cows and their calves, which could only be done by selecting them from the herd, and it being necessary to the execution of the express authority to sell, the law will imply the authority to take the fifty cows and calves from the larger number (Oxsheer *vs.* Watt, 91 Tex., 124). The chattel mortgage was valid between the parties to it.

Upon default in payment, King or the holders of the note had the right to select from J. H. and M. E. Cooke's stock of cattle and sell fifty cows and calves corresponding to the description in the mortgage. If the right had been exercised while the calves of the spring of 1891 were following their mothers, the selection of
224 the cow would have identified the calf. But having failed to exercise the right until in the course of nature the dam and the young would separate, it has become impossible to identify the calves, and all claim upon them has failed, before Avery converted the stock.

The owner of property has the right to dispose of it as he may choose or to grant to another any right in it which is not inconsistent with his obligation to creditors nor in violation of any law, and one who purchases property that has been so disposed of or encumbered, with notice of the right conferred, will take it subject to the burden fixed upon it (Kuhn *vs.* Com. Council, 70 Mich., 535).

If the instrument in question had in express terms authorized T. H. King to select the fifty cows and calves from the herd belonging to Cooke and wife, we presume that no one would have

questioned its validity as between the parties nor as to any person whose rights were subsequently acquired with notice, nor would there have been a doubt that it was a chattel mortgage. We think that any person who might read it, knowing of the herd of one hundred cows in the same mark and brand, the property of the mortgagors, must know that the instrument conferred by implication the right to select from the herd the fifty cows. The implication of authority gives to the instrument the same legal effect as if it were expressed. It was "intended to operate as a lien upon the property named" and is within the terms of article 3328, Revised Statutes. The record of it constituted constructive notice to Avery.

We have examined the authorities cited by the plaintiffs in error and find none of them to be in conflict with Oxsheer *vs.* Watt, cited above. The cases cited are distinguishable from that case by the absence from the former of the designation of the particular group in which those described in the mortgage were included and the want of either express or implied authority to make selection of the thing mortgaged from the larger number of things designated by its terms and attendant circumstances.

We have carefully examined the twenty-one assignments of error contained in the application for a writ of error and have dis-
225 cussed those that we deem of importance sufficient to demand it. We do not feel*ed* called upon to enter upon the discussion of each of this large number of assignments, but will dispose of those not particularly mentioned by saying we find no material error in the acts of the court complained of.

By means of the replevy bond Avery got possession of the property and converted it to his own use. He was liable for its value, and the judgment against him was properly entered.

The district court erred in rendering judgment against C. C. Cobb and H. I. Phillips and in taxing plaintiffs below with the costs of both original suits up to the time of consolidation and the court of civil appeals properly reversed the judgment as to that cost.

The court of civil appeals erred in affirming the judgment of the district court against Cobb and Phillips; also in reversing the judgment of the district court which refused judgment for the value of the calves, and in rendering judgment against plaintiffs in error for their value. It is therefore ordered that the judgments of the district court and of the court of civil appeals as between Popper & Brother and R. R. Neyland and J. M. Avery be reversed and set aside, and this court render the judgment which should have been rendered in the district court, as follows: That I. Popper and E. Popper, composing the firm of I. Popper & Bro., and R. R. Neyland, composing the firm of R. R. Neyland & Co., recover of J. M. Avery the sum of eight hundred and fifty dollars, with six per cent. interest per annum from November 23rd, 1897, with all costs which accrued in the district court in cause No. 3406, entitled I. Popper & Bro. *vs.* J. H. and M. E. Cooke *et al.*, and in the consolidated case. It is further ordered that C. C. Cobb and H. I. Phillips go hence without day; that plaintiffs, I. Popper & Bro. and R. R. Neyland, pay the costs which accrued prior to the con-

solidation in the district court in case No. 3407, styled R. R. Neyland & Co. *vs.* J. H. and M. E. Cooke *et al.*, and all costs in this court and in the court of civil appeals. The sum adjudged against J. M. Avery will be divided between I. Popper & Bro. and
226–239 R. R. Neyland in the proportion of their judgments against J. H. Cooke in the district court, and, when collected, to be a credit upon those judgments.

T. J. BROWN,
Associate Justice.

Endorsed: No. 720. John M. Avery *et al. vs.* I. Popper & Brother *et al.* Opinion. Reversed and rendered. Filed in supreme court Dec. 19, 1898. Chas. S. Morse, clerk.

* * * * * * *

240 *Motion for Rehearing by Defendants in Error.*

Filed January 2, 1899.

In the Supreme Court of Texas.

JOHN M. AVERY ET AL.
vs.
I. POPPER & BRO. ET AL. } No. 720.

To the hon. supreme court of Texas:

Now come I. Popper & Bro., a firm composed of I. Popper & E. Popper, and R. R. Neyland & Co., a firm composed of R. R. Neyland, the defendants in error herein, and file this their motion for a rehearing, and for such they say:

1st. This court erred wherein it found and stated as follows: "The judgment of the district court quashing the writs of sequestration issued in the separate suits originally instituted by the plaintiffs in this case was not reversed by the court of civil appeals, and no complaint is made in this court by the defendants in error of that action of the district court. In considering all questions growing out of the quashing of those writs that order will be treated as correctly rendered and the writs properly quashed," because said finding is evidently the result of some mistake on the part of this court, as the statement made below from the record will show beyond controversy.

Statement.

On page 29, brief for appellees filed in the court of civil appeals, will be found their cross-assignments of errors complaining of the action of the district court in quashing the sequestration proceedings in words and — as follows, viz:

"*First and Second Cross-assignment of Error.*

"First. The court erred in quashing all the sequestration proceedings instituted and sued out by I. Popper & Bro. and R. R. Neyland in the separate suits originally instituted by each.

Second. The court erred in adjudging that appellees pay costs created by reason of the institution and suing out of said sequestration proceedings."

241 The court of civil appeals sustained the above cross-assignments, and, among other, used the following language: "The court (district) therefore, in our opinion, erred in quashing this writ of sequestration and adjudging the costs of such proceedings against the appellees;" and in concluding the opinion the court said: "The judgment of the district court against appellee for all costs created by reason of the institution and suing out of the writs of sequestration will be set aside and judgment here entered against said appellees for the amount of the costs that accrued in one of the original suits up to the time it was consolidated with the other, and the costs of this appeal will be adjudged against appellants."

II.

The court erred in not reversing the judgment of the district court wherein it quashed the sequestration writs and proceedings sued out by the defendants in error, and in adjudging the costs incident thereto against defendants in error, and in not affirming the judgment of the court of civil appeals wherein it held such action of the district court erroneous, and wherein it rendered judgment for the defendants in error sustaining such sequestration proceedings and adjudging costs against plaintiffs in error, and also adjudging the costs of appeal against plaintiffs in error.

III.

The court erred in not reversing the judgment of the district court wherein it taxed defendants in error with all the costs of the two suits up to the time of the consolidation, including costs of sequestration proceedings, and in not also reversing the judgment of the court of civil appeals wherein it taxed the defendants in error with the costs of one suit up to the time of the consolidation; and the court erred in not rendering judgment in favor of defendants in error for all costs of both suits, including costs of sequestration proceedings, from the inception of said suits.

242 *Statement.*

On page 30 of brief for appellees their third cross-assignment will be found as follows, viz: "The court erred in adjudging against appellees the payment of all costs created in the two suits up to January 7th, 1897, the date of filing the consolidated pleadings."

Argument.

If the proceedings were not void in their beginning, as held by this court, and if it was a matter about which Avery could not complain, as it seems the court held, then we suggest why should defendants in error be taxed with any of these costs? The consoli-

dated pleading as an amendment cured the only defect—that is, one of parties—and it related back to the commencement of the suits. 1 Encyclopædia of P. & P., 491, note 6, and authorities cited.

IV.

The court erred in not reversing the judgment of the district court wherein it refused to give defendants in error judgment for the value of the calves against Avery and Cobb and Phillips, sureties on replevy bond, and in not affirming the judgment of the court of civil appeals wherein it reversed the judgment of the district court in this respect and rendered judgment in favor of defendants in error against said Avery and Cobb & Phillips for the value of said calves; and as the court reversed both the judgments of the district court and of the court of civil appeals, it erred in not rendering judgment for the defendants in error against Avery and the sureties on his replevy bond, Cobb and Phillips, for the full value of the cows, calves, horses, and mules, with all costs created in the district court, court of civil appeals, and supreme court, with judgment also against their sureties on supersedeas appeal bond.

Argument.

If this court finds itself in error in the particulars pointed out in the first ground for rehearing or assignment of error herein, and if the court should sustain the assignment of defendants in
243 error, then it would follow that defendants in error would be entitled to judgment against Cobb and Phillips as well as against Avery for the amount so rendered against Avery.

V.

The court erred in not reversing the judgment of the district court wherein it refused to render judgment for the defendants in error for the value of the 50 calves, and in not affirming the judgment of the court of civil appeals wherein it reversed the district court and gave defendants in error judgment for the value of said calves, because:

(*a.*) The cattle covered by said mortgage were at the time of the execution thereof identified, as found by the court of civil appeals, and as between mortgagor and mortgagees known and susceptible of perfect identity, the mortgage providing that the fifty calves should be branded, and they were afterwards so branded and at the time of the levy were identified, being then 17 two-year-old past steers and 33 two-year-old past heifers, of the value, as found by the court of civil appeals, of $534.00.

Statement.

The complete description of the cows and calves in the mortgage is as follows, viz:

Also 50 head of cows, with this spring calves (meaning spring of 1891) following the cows, not over seven years old, cows branded

Cook on left side and O K on left hip, and marked swallow fork in right ear, and under bit and over bit in left ear; calves to be marked and branded." * * * (Trans., p. 185, lines 24–30.)

J. H. Cooke testified as follows:

"The fifty cows mentioned in the chattel mortgage sued on were mostly Durham cattle, and were branded Cook on the left side and O. K. on the left hip, and were marked swallow fork in right ear and under bit in left ear. These cows were raised by myself and Mrs. Cook. The mortgage was executed in May, 1891, and
244 described certain calves as following the fifty cows. Those were the calves born in the spring of 1891" (Trans., p. 166, lines 23–32; page 167, line 1).

The sequestration writs were sued out for 50 cows, 17 two-year-old steers, and 33 head of two-year-old heifers, branded Cook on left side and O. K. on the left hip (Trans., p. 8, lines 8–11). The sheriff's return shows levy on cattle thus described (Trans., p. 9, lines 25–30; also p. 12, lines 1–4).

The court of civil appeals found as follows, viz: "At the time the mortgage was executed to secure the note there were many more animals of the same description mingled with those upon which the mortgage was given, but the evidence is sufficient to show that just prior to the execution of the mortgage the animals embraced in it were pointed out to Mr. Neyland, who represented King in taking the mortgage security and drafting the mortgage." Again, in discussing the law of the case, the court said, with reference to this designation: "However such designation might effect a *bona fide* purchaser for value without notice, it would be good as between the parties to the mortgage so long as the property designated could be identified and separated from other property of the mortgagors with which it was mingled, and its effect would be the same between the mortgagee and a third party whose title to the property is not better than the mortgagors."

The trial court found (paragraph No. 5) that at the time of the levy the calves described in the mortgage as the spring calves of the 50 cows had been marked and branded in the mark and brand of M. E. Cook, and were then seventeen two-year old past steers and 33 head of two-year-old past heifers (Tran., p. 160, lines 11–17). The mark and brand of Mrs. M. E. Cooke was the Cook O K brand with which the cattle were branded (Trans., p. 188, lines 18–32).

Argument.

We respectfully submit that whether or not the 50 cows and calves covered by this mortgage were susceptible of identity or were identified or not is a question of fact, and that the court of
245 civil appeals found as a fact such identity good as between mortgagors and mortgagee, and of course good as to Avery, who, not being a purchaser in good faith for value, can occupy no better position.

Again, the court seems to have lost sight of the fact that the mortgage provided that the fifty calves were to be marked and

branded, and that this was done as provided for in the mortgage, so that the mortgage gave and provided for the calves as definite a description as that given to the cows.

Authorities.

(*b.*) Because the description contained in the mortgage of the 50 calves was good as between the parties and as to Avery, who was not a purchaser for value, and defendants in error from said description had at least the right of selection.

Argument.

This court, in its opinion, holds as follows: "Upon default in payment, King or the holders of the note had the right to select from J. H. and M. E. Cooke's stock of cattle and sell fifty cows and calves corresponding to the description in the mortgage. If the right had been exercised while the calves of the spring of 1891 were following their mothers, the selection of the cow would have identified the calf. But having failed to exercise the right until in the course of nature the dam and the young separate, it has become impossible to identify the calves, and all claim upon them has failed before Avery converted the stock."

We respectfully suggest that this court has trenched upon the jurisdiction of the honorable court of civil appeals, wherein it finds that in the course of nature the dam and young would separate, and it has become impossible to identify the calves and all claim upon them had failed before Avery converted the stock.

As said before, we believe the question of identity is a question *de hors* the instrument largely and is a question of fact found by the court of civil appeals in favor of the enforcement of the
246 mortgage; but, treating the mortgage as the court seems to have done, as covering the increase after the mortgage of the dam, we believe the court is in error. The proposition announced by the court quoted above is the correct proposition to apply, not between mortgagor and mortgagee and those occupying their relations, but is to be applied where the rights of an innocent purchaser have intervened. In the case of Bank *vs.* Mortgage Co., 86 Tex., p. 638, adopting the legal conclusions of the court of civil appeals, this court, among other things, said:

"We now reach the question of whether the mortgage will cover the increase of the herd without a special mention to that effect. The following authorities lay down the rule that between the parties to the instrument the mortgage of personal property covers and includes its increase" (citing authorities).

In Edwards *vs.* Osman, 84 Texas, 659, in the foreclosure of a mortgage that did not cover the increase of the cattle, the court says: "It is true the mortgage did not expressly include the increase of the stock of cattle in the brands mortgaged, but we are not prepared to assent to the proposition that this was necessary in order to extend the mortgage to the natural increase."

Again, on page 638 (S. C.), this court said: "But as between the parties to the mortgage, when the rights of an innocent third party have not intervened, we believe the mortgage of the dam covers its increase, and that the mortgage should extend not only to the thing described, but to all that shall arise or proceed from it."

On the questions raised by the court, we quote from Meyer *vs.* Cook, 85 Ala., 417: "In this case it is said: 'The attempt has been made to draw a distinction when, during the time the property remained with the mortgagor, the offspring so increased in strength and maturity as to cease to follow the dam. In such case it has been contended that the mortgage ceases to bind the offspring. We are at a loss to conjecture on what principle such a distinction can be maintained. We apprehend, however, that all such seem-
247 ing rulings rest on an entirely different principle. The exception has been allowed only in favor of *bona fide* purchasers who, finding such offspring in the possession of the mortgagor, arbiter of its own movements and not following the dam, purchased and paid for the same without notice of the mortgage lien. Such offspring not being mentioned in any recorded mortgage, and there being nothing visible to put the purchaser on inquiry, it was ruled that it would be a fraud on him to take from him the property he had bought and paid for in good faith and without notice.'"

17 Lawyers, Reports Annotated, 82; Dwyer *vs.* State, 88 Ala., 225; Forman *vs* Proctor, 9 B. Mon., 724; Hughes *vs.* Graves, 1 Litt., 317; Winter *vs.* Landphere, 42 Io., 471; Kellogg *vs.* Lovely, 46 Mich, 131; 41 American Reports, 151.

We have presented the above authorities because the court has assimilated this case to one where the mortgage covered the increase of the dam after the execution of the mortgage, and when in course of nature the young had separated from the old. Even in such a case, as between the parties and those who are not innocent purchasers from the mortgagor, we submit that the authorities bear us out in the contention that the lien of the mortgagee is not lost by the fact of the separation of the young from its dam in the course of nature, and that the rule announced by the court in this case is the rule that obtains when the rights of an innocent purchaser have intervened.

But, may it please the court, how much stronger is this case than one where by implication the mortgage is made to cover increase. There the dam only is described. Here we have the dam described and each calf mentioned and just as definitely described. The cow is described as branded, and the calf is described as not branded then, but to be branded, which was done in accordance with the provisions of the mortgage, so that, essentially, the *cows* are described with as much certainty as the cows.

Using the logic of this court with reference to the cows,
248 we do not see how the court can decline to give defendants in error judgment for the calves also.

The court holds that no right attached under the mortgage to spe-

cific animals; that the power was given to sell certain cows and their calves, which could only be done by selecting from the herd, and the law will imply the authority to take the cows and calves from the larger herd. Thus the court, under the doctrine of election, sustained a mortgage as good between the parties, and permitted the defendants to recover the value of the cows—not any specific cows, but fifty cows of the larger herd—because the cattle mortgaged could not be identified, but refused to do so as to the calves, because in the course of nature they had separated from the dam and could not be identified. Thus we get the fifty cows from the herd because no specific cows can be identified, and we lose the fifty calves from the larger herd because they cannot be identified. We may respectfully ask the court what becomes of our right of election or selection as to the fifty calves. If the cows and calves were susceptible of individual identity, the doctrine of election would find no place in this discussion. It is only when the description is general on a certain number of the larger herd that the right of selection is invoked and applied. To mention fifty calves of a certain herd of a certain age, to be thereafter branded, is as certain as to mention fifty cows, giving the brands, etc.

We therefore respectfully pray the court to grant defendants in error a rehearing, and that the judgment of the court of civil appeals be in all things affirmed except wherein it renders judgment against defendants in error for the costs of one case up to the time of consolidation, and in this respect defendants in error pray this court to reverse the judgment of the honorable court of civil appeals and render same in their favor, and for general and special relief.

Defendants in error show further that plaintiffs in error are represented in this cause by Cobb & Avery, a firm of attorneys
249 who reside in Dallas, Dallas county, Texas, said firm being composed of Chas. C. Cobb and John M. Avery.

CRADDOCK & LOONEY,
Attorneys for Defendants in Error.

Endorsed: Mo. No. 642. No. 720. John M. Avery *et al. vs.* I. Popper & Bro. *et al.* Motion for rehearing. Service accepted. Filed in supreme court January 2, 1899. Chas. S. Morse, clerk, by F. T. Connerly, deputy.

Opinion Supreme Court on Motion.

Filed January 30, 1899.

JOHN M. AVERY ET AL. *vs.* I. POPPER & BRO. ET AL. } No. 720. Motions No. 641 and 642.

We devoted much time to the examination of the questions presented in the motions for rehearing in this case when it was under investigation, and we have again carefully examined the various assignments and find no error in our former opinion upon the

points presented in the motion of John M. Avery, and it is therefore overruled. We do not feel called upon to discuss those questions further.

In our former opinion, the judgment of the district court which quashed the writs of sequestration issued in the original suits was treated as subsisting and correct orders because they had not been set aside by the action of the court of civil appeals. Upon further consideration of the matter as presented in the motion of I. Popper & Brother and R. R. Neyland, we conclude that we were in error in so holding. It is the practice of this court not to reverse a judgment of the district court or of the court of civil appeals if, upon the whole case as presented, the judgment is right, although an erroneous reason may be assigned for entering it. Applying this rule, we have examined the motions made to quash the several writs of sequestration, and conclude that the district court
250 erred in quashing them; the judgment sustaining the motions is reversed. The ground upon which the court acted, as stated by the defendant in error, which is not denied by plaintiff, was that the suits instituted by each of the appellants separately were brought without authority of law, and that the proceedings under them prior to the consolidation were void. We have held that they were not void, but irregular, from which the conclusion must be reached that the writs of sequestration were valid.

The other grounds assigned in the motion of I. Popper & Brother and R. R. Neyland are overruled.

If Popper & Bro. and R. R. Neyland had joined originally in the one suit, each one would have prosecuted it for the amount of money due to such party, and if the writs of sequestration had been sued out in such joint suit by the owners of the note, they must have been separate proceedings by each, because one of the parties could not be required to swear to the debt due to the other nor to give bond for damages caused by the prosecution of that claim. It follows that the costs which accrued from suing out the writs of sequestration must have been incurred if the suit had been brought jointly in the first instance by the owners of the note. The judgment of this court is erroneous in charging against I. Popper & Bro. and R. R. Neyland the costs which were occasioned by suing out and executing the writ of sequestration in one of these cases. It is therefore ordered that the judgment heretofore entered in this cause be set aside, and that judgment be now entered that I. Popper & E. Popper, composing the firm of I. Popper & Bro., and R. R. Neyland, composing the firm of R. R. Neyland & Co., recover of J. M. Avery and the sureties on his replevy bond, Charles C. Cobb and H. I. Phillips, the sum of $850.00, with six per cent. interest per annum from November 23rd, 1897, with all costs which accrued in the district court in cause number 3406, entitled I. Popper & Brother *vs.* J. H. & M. E. Cooke *et al.*, and all costs which accrued in the consolidated case; also all costs which were occasioned by suing out and executing the writ of sequestration in case No. 3407, styled R. R. Neyland *vs.* J. H. & M. E. Cooke *et al.*, and that the said I. Popper

and E. Popper and R. R. Neyland pay all other costs ac-
251–259 cruing in No. 3407 prior to the consolidation of the said causes except the costs of the sequestration, and that the said I. Popper & E. Popper and R. R. Neyland pay all costs in this court and in the court of civil appeals. The sum adjudged against J. M. Avery will be divided between I. Popper & Bro. and R. R. Neyland in the proportion of their judgments against J. H. Cooke in the district court, and, when collected, to be credited upon those judgments.

T. J. BROWN,
Associate Justice.

Endorsed: No. 641 & 642. John M. Avery *et al. vs.* I. Popper & Bro. *et al.* Opinion. Filed in supreme court Jan. 30, 1899. Chas. S. Morse, clerk.

* * * * * * *

260 *Opinion of Supreme Court on Motion No. 654 for Rehearing.*

Filed March 23rd, 1899.

JOHN M. AVERY ET AL.
vs.
I. POPPER & BROTHER ET AL. } Mo. No. 654. Cause No. 720.

The motion of J. M. Avery, C. C. Cobb, and H. I. Phillips for rehearing is overruled, and they are adjudged to pay the costs of this motion. It appearing that an error was committed by this court in its last judgment in adjudging the costs of the court of civil appeals against I. Popper & Brother and R. R. Neyland, it is ordered that said judgment be so reformed that the costs of the court of civil appeals be adjudged against J. M. Avery, C. C. Cobb, and H. I. Phillips.

T. J. BROWN,
Associate Justice.

Endorsed: Mo. No. 654. J. M. Avery *et al. vs.* I. Popper & Bro. *et al.* Opinion. Rehearing refused. Filed in supreme court March 23rd, 1899. Chas. S. Morse, clerk.

261 *Judgment of Supreme Court.*

MARCH 23RD, 1899.

J. M. AVERY ET AL.
vs.
I. POPPER & BRO. ET AL. } Mo. No. 654. No. 720. From Hunt County, 4th District.

Opinion on motion for rehearing delivered by Associate Justice Brown.

This day came on to be heard the motion of the plaintiffs in error for a rehearing, and the same having been duly considered, it is ordered that said motion be overruled and that the plaintiffs

in error, J. M. Avery, Chas. C. Cobb, and H. I. Phillips, pay all costs of this motion: but it appearing to the court that there was error committed by this court in its last judgment in adjudging the costs of the court of civil appeals against the defendants in error, it is therefore considered, adjudged, and ordered that the judgment heretofore entered in this cause on, to wit, January 30, 1899, be vacated and set aside, and the following judgment entered in lieu thereof, to wit: This cause came on to be heard on writ of error to the court of civil appeals for the fourth supreme judicial district, and the original transcript in said cause being before the court, as well as the transcript showing the proceedings had in said court of civil appeals, and these having been duly considered, because it is the opinion of this court there was error in the judgment of said court of civil appeals and of the district court, it is therefore considered, adjudged, and ordered that said judgments be reversed, and this court proceeding to render such judgment as should have been rendered, it is therefore considered, adjudged, and ordered that the defendants in error, I. Popper and E. Popper, composing the firm of I. Popper & Brother, and R. R. Neyland, composing the firm of R. R. Neyland & Co., do have and recover of and from the plaintiff in error, J. M. Avery, and Chas. C. Cobb and H. I. Phillips, sureties on his replevy bond, the sum of $850.00, with six per cent. interest per annum from November 23rd, 1897, with all costs which accrued in the district court in cause No. 3406, entitled
262 I. Popper & Brother *vs.* J. H. & M. E. Cooke *et al.*, and all costs which accrued in the consolidated case, and also all costs which were occasioned by the suing out and executing the writ of sequestration in cause No. 3407, styled R. R. Neyland *vs.* J. H. & M. E. Cooke *et al.*, and that the said defendants in error, I. Popper and E. Popper and R. R. Neyland, pay all other costs accruing in No. 3407 prior to the consolidation of the said causes, except the costs of the sequestration, and that said defendants in error, I. Popper and E. Popper and R. R. Neyland, pay all costs in this behalf expended in this court, except the costs of the motion for rehearing above adjudged against the plaintiffs in error, and that the plaintiffs in error, J. M. Avery, Chas. C. Cobb, and H. I. Phillips, pay all costs in this behalf expended in the court of civil appeals. The sum adjudged against the plaintiffs in error, J. M. Avery, and the sureties on his replevy bond, Chas. C. Cobb and H. I. Phillips, will be divided between I. Popper & Bro. and R. R. Neyland in the proportion of their judgments against J. H. Cooke in the district court, and when collected to be credited upon those judgments, and this decision be certified to the district court for observance.

In the Supreme Court of Texas.

J. M. AVERY ET AL., Plaintiffs in Error,
vs.
I. POPPER & BRO. ET AL., Defendants in Error. } No. 720

Motion for Rehearing by J. M. Avery, C. C. Cobb, & H. I. Phillips.

Now come the plaintiffs in error in the above cause, J. M. Avery, C. C. Cobb, and H. I. Phillips, and move the supreme court to set aside the last judgment against them, rendered herein on March 23rd, 1899, and to grant them a rehearing for the following reasons and upon the following grounds, viz:

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First.

The supreme court of Texas erred in rendering judgment against the plaintiffs in error for all the costs incurred and expended in the court of civil appeals, because the judgment of both the district court and the court of civil appeals were adjudged to be erroneous, and both were reversed by this court on account of said errors, and the costs of all the appellate courts should be taxed against the defendants in error.

Second.

The supreme court of Texas erred in holding that the sequestration proceedings were valid, and in rendering judgment against plaintiffs in error on the replevy bonds.

Third.

The supreme court of Texas erred in taxing against these plaintiffs in error all costs incurred in the district court except the costs accruing in cause No. 3107 prior to the consolidation of these causes, and in taxing against them all costs of these sequestration proceedings.

Fourth.

The supreme court of Texas erred in affirming the judgments below against plaintiffs in error, J. M. Avery, C. C. Cobb, and H. I. Phillips, for any amount, and in rendering judgment against them for any amount, because all of said judgments are contrary to the law, evidence, and facts, in that the pleadings, evidence, and facts showed that all the property sued for was legally levied upon by the United States marshal for the northern district of Texas under a valid execution issued from the United States circuit court for the northern district of Texas, at Dallas, Texas, based upon a valid judgment rendered by said court, and was legally sold by the said United States marshal, and that all of said property belonged to J. H. Cooke, the defendant in said judgment and execution, and was legally levied upon and sold thereunder, and a good title to the same passed to the purchaser at said sale, and that the mortgage

sued on was void as against said execution and the purchaser thereunder, and the said plaintiffs in error claimed under said
264 execution and the sale thereunder and the said purchaser, and the evidence fails to show that the defendants in error had selected any animals branded, marked, and aged as described in said mortgage, and said judgment failed to give full force and effect to said execution, levy, and sale, and the acts of the said marshal thereunder, and *are* against the right, title, commission, and authority and immunity specially set up and claimed by said plaintiffs in error under said execution and the laws of the United States and the judgments and courts thereof.

Fifth.

The supreme court of Texas erred in affirming the judgments below and in rendering judgment against plaintiffs in error, J. M. Avery, C. C. Cobb, and H. I. Phillips, and in holding that the alleged mortgage sued on was valid as against the above-mentioned judgment and execution of the United States circuit court and the levy and sale thereunder by the United States marshal, and in holding that the mortgagee could recover against the purchaser at such sale and those claiming under him the value of 50 cows and three horses and mules, because, as appears from the evidence, the findings of fact, and the opinion of said supreme court, and the record herein, said mortgage was invalid as against such execution, sale, and purchaser, in this: At the time said mortgage was given there were many more animals of the same description mingled with those upon which the mortgage was attempted to be given, but the animals attempted to be covered by the mortgage were not separated from the others of the same description with which they were mingled, nor was there such separation up to the time said execution from the United States court was levied on the property in controversy, nor had the mortgagee in any way attempted to make a selection of any animals, and, the animals involved in this case being a larger number of the same description and not having been separated or identified, no lien attached to any particular animals in the herd, and no right attached under the attempted mortgage to any specific animals, nor did it give a lien upon an undivided interest in the herd, and as a matter of law said mortgage was invalid as against said
265 execution, levy, and sale, and said property passed to the purchaser at said execution sale, and the plaintiffs in error claiming under him, free from any claims or rights therein by said mortgagee, and said judgment of said supreme court of Texas is against the right and title specially claimed under said judgment of the United States circuit court, and execution sale, and the acts of the said United States marshal, and fails to give full force and effect to the same, the decision in this case being the first one by the supreme court of Texas or any other supreme court holding such an attempted mortgage valid against execution creditors.

Fifth.

The supreme court of Texas erred in affirming the judgments below and in rendering judgment against said plaintiffs in error for $850.00, because from the opinion of said supreme court and the record herein it clearly appears that at most plaintiffs in error were only liable for the value of 50 cows of the value of $13.00 per head, and this would only amount to $650.00, and the additional $200.00 consists of the value of one bay mare colt, one bay horse colt, and one black mule colt, and said mortgage sued on did not attach to or cover said three colts, they having separated from their dams before any right of selection was exercised, and said colts were duly levied on and sold by said United States marshal under the above-mentioned judgment and execution from said United States court, and they belonged to the defendant in said execution and title passed by said sale, and plaintiffs in error claimed under said sale; and to this extent, at least, said judgment of said supreme court of Texas is against the right and title specially claimed under said United States circuit court, judgment and execution sale, and the acts of the said United States marshal, and fails to give full force and effect to same.

Sixth.

The supreme court of Texas erred in affirming the judgments of the courts below and in rendering judgment against said plaintiffs in error and in holding that the mortgage sued on was good as against them, because the undisputed evidence and the facts
266 showed, as a matter of law, that the mortgage sued on, in connection with the acts of the mortgagor and the mortgagee, was fraudulent and void as against the creditors of the mortgagor and those claiming under such creditors, in that the mortgagor, J. H. Cooke, was insolvent, and with the consent of the mortgagee he sold $800.00 worth of the mortgaged property, and with said consent retained and used $200.00 of said money for his own use and benefit, and plaintiffs in error claimed under a judgment against said J. H. Cooke, rendered by the United States circuit court for the northern district of Texas long before the giving of said mortgage, and under a valid execution issued on said judgment by said court, and a valid levy and sale thereunder by the United States marshal for the northern district of Texas, and said judgment of said supreme court of Texas is against the right and title specially claimed under said United States circuit court, judgment and execution sale, and the acts of said United States marshal, and fails to give full force and effect to same.

Seventh.

The supreme court of Texas erred in affirming the judgments below and in rendering judgment against said plaintiffs in error for $850.00, the alleged value of 50 cows and three colts, because, under the circumstances of the case, the findings of fact as to the value of said animals and the evidence upon which said findings were based did not, as a matter of law, furnish a proper basis or

measure of damages by which judgment could be rendered against them, in that said findings established said values at the time of the last trial of this case in November, 1897, and not their value at the time the sequestration proceedings occurred, or the conversion, if any, took place in June, 1893, and said judgment of said supreme court applied a different rule and allows greater damages when a sale is made under a valid execution from the United States circuit court by the United States marshal from that applied and allowed when a sale is made under an execution from a State court by a State sheriff, or other State officer, in similar cases, and thereby said judgment of said supreme court discriminates adversely,
267 unjustly, and illegally against sales made under executions by United States marshals contrary to the provisions of the Revised Statutes of the United States, sec. 916 and 788, and said judgment of said supreme court fails to give full force and effect to said execution from said United States circuit court, and the levy, sale, and acts of said marshal thereunder, and is against the right, title, commission, authority, and immunity specially set up and claimed by said plaintiffs in error under said execution and the laws of the United States and the judgments of the courts thereof.

The attorneys of record for the defendants in error are Messrs. Craddock & Looney, residing at Greenville, Hunt county, Texas.

COBB & AVERY,
Attorneys for Plaintiffs in Error, J. M. Avery, C. C. Cobb, and H. I. Phillips.

Endorsed: Motion No. 673. No. 720. J. M. Avery *et al.*, plaintiffs in error, *vs.* I. Popper & Brother *et al.*, defendants in error. Motion for rehearing by plaintiffs in error. Filed in supreme court April 6, 1899. Chas. S. Morse, clerk.

Order Overruling Motion for Rehearing.

APRIL 20TH, 1899.

J. M. AVERY ET AL. *vs.* I. POPPER & BRO. ET AL. } No. 720. Mo. #673.

This day came on to be heard the motion of the plaintiffs in error for a rehearing, and the same having been duly considered, it is ordered that said motion be overruled; that the plaintiffs in error, J. M. Avery, C. C. Cobb, and H. I. Phillips, pay all costs of this motion.

268 *Petition for Writ of Error.*

J. M. AVERY ET AL., Plaintiffs in Error, *vs.* I. POPPER & BROTHER ET AL., Defendants in Error. } No. —.

Now comes the plaintiffs in error in the above case, John M. Avery, Chas. C. Cobb, and H. I. Phillips, and complain that in the

record and proceedings, and also in the judgment in a cause between John M. Avery, Chas. C. Cobb, and H. I. Phillips, plaintiffs in error, and I. Popper and E. Popper, composing the firm of I. Popper & Brother, and R. R. Neyland, composing the firm of R. R. Neyland & Company, and J. H. Cook, M. E. Cooke, W. W. Avery, W. H. Bush, and S. J. Mason, defendants in error, finally decided and determined by the supreme court of Texas, and in which final judgment was rendered on the 23rd day of March, 1899, and motion for rehearing was overruled by said court on April 20th, 1899, manifest error hath happened, as appears from said record, proceedings, and judgment, and the assignments of error presented herewith, to the great damage of said plaintiffs in error, John M. Avery, Chas. C. Cobb, and H. I. Phillips.

Wherefore said John M. Avery, Chas. C. Cobb, and H. I. Phillips pray for the allowance of a writ of error to the Supreme Court of the United States and for such other orders and process as may cause said judgment, records, and proceedings to be corrected by said Supreme Court of the United States.

COBB & AVERY,
JOHN M. AVERY,
Attorneys for J. M. Avery, C. C. Cobb, and H. I. Phillips.

Endorsed: No. —. John M. Avery *et al.*, plaintiffs in error, *vs.* I. Popper & Brother *et al.*, defendants in error. Petition for writ of error. Filed in supreme court May 9th, 1899. Chas. S. Morse, clerk.

269 *Allowance of Writ of Error.*

JOHN M. AVERY ET AL., Plaintiffs in Error,
vs.
I. POPPER & BROTHER ET AL., Defendants in Error. } No. —.

Upon reading and considering the petition in the above case of plaintiffs in error, John M. Avery, Chas. C. Cobb, and H. I. Phillips, for a writ of error to the Supreme Court of the United States, it is ordered that a writ or error to the Supreme Court of the United States be, and is hereby, allowed herein, and that the same be made a supersedeas, and the bond for supersedeas be fixed at three thousand dollars, and a bond for said sum being presented herewith is hereby approved and ordered to operate as a supersedeas.

Witness my hand this the 2nd day of May, A. D. 1899.

E. D. WHITE,
Associate Justice of the Supreme Court of the United States.

Endorsed: No. —. John M. Avery *et al.*, plaintiffs in error, *vs.* I. Popper & Brother *et al.*, defendants in error. Allowance of writ of error. Filed in supreme court May 9th, 1899. Chas. S. Morse, clerk.

Writ of Error—Supersedeas Bond.

Know all men by these presents that we, John M. Avery, Chas. C. Cobb, and H. I. Phillips, as principals, and W. M. Alexander and

R. B. Robinson, as sureties, are held and firmly bound unto I. Popper and E. Popper, composing the firm of I. Popper and Brother, and R. R. Neyland, composing the firm of R. R. Neyland & Co., and J. H. Cooke, M. E. Cooke, W. W. Avery, W. H. Bush, and S. J. Mason in the full and just sum of three thousand dollars, to be paid to the said I. Popper and E. Popper, composing the firm of
270 I. Popper and Brother, and R. R. Neyland, composing the firm of R. R. Neyland & Co., and J. H. Cooke, M. E. Cooke, W. W. Avery, W. H. Bush, and S. J. Mason, and their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 2nd day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas lately, at a regular term of the supreme court of Texas, and on, to wit, the 23rd day of March, A. D. 1899, in a suit depending in said court between John M. Avery, Chas. C. Cobb, and H. I. Phillips, plaintiffs in error, and said I. Popper and E. Popper, composing the firm of I. Popper and Brother, and R. R. Neyland, composing the firm of R. R. Neyland & Co., and J. H. Cooke, M. E. Cooke, W. W. Avery, W. H. Bush, and S. J. Mason, defendants in error, and numbered 720 on the docket of said court, a judgment was rendered again the said John M. Avery, Chas. C. Cobb, and H. I. Phillips for eight hundred and fifty dollars and certain interest and costs therein specified, and the said John M. Avery, Chas. C. Cobb, and H. I. Phillips having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid suit, and a citation directed to the said I. Popper and E. Popper, composing the firm of I. Popper and Brother, and R. R. Neyland, composing the firm of R. R. Neyland & Co., and J. H. Cooke, M. E. Cooke, W. W. Avery, W. H. Bush, and S. J. Mason, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said John M. Avery, Chas. C. Cobb, and H. I. Phillips shall prosecute their writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

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JOHN M. AVERY. [SEAL.]
CHAS. C. COBB. [SEAL.]
H. I. PHILLIPS. [SEAL.]
W. M. ALEXANDER. [SEAL.]
R. B. ROBINSON. [SEAL.]

Sealed and delivered in presence of—

——— ———.

Approved as a supersedeas bond by—

E. D. WHITE,
Associate Justice of the Supreme Court of the United States.

STATE OF TEXAS, }
Dallas County. }

I, H. W. Jones, clerk of the district court in and for Dallas county, Texas, do hereby certify that in my opinion the within and foregoing bond is good for the amount therein named, and I would accept and approve it if presented to me for approval.

Witness my hand and official seal this 31st day of March, 1899.

[SEAL.] H. W. JONES,
Clerk District Court, Dallas County, Texas.

Endorsed: J. M. Avery *et al.*, plaintiffs in error, *vs.* I. Popper and Brother *et al.*, defendants in error. Writ of error—supersedeas bond. Filed in supreme court May 9th, 1899. Chas. S. Morse, clerk.

Assignment of Errors.

JOHN M. AVERY ET AL., Plaintiffs in Error,
vs.
I. POPPER & BROTHER ET AL., Defendants in Error. } No. —.

In connection with the writ of error to the Supreme Court
272 of the United States, granted and allowed in above case, now comes the plaintiffs in error herein, J. M. Avery, C. C. Cobb, and H. I. Phillips, and say that there were errors committed by the supreme court of Texas and the court of civil appeals and district court in the above cause, and that there were errors in the record, proceedings, and final judgments therein, as of record is manifest, and said plaintiffs in error allege and assign the following errors, for which they ask a reversal of the judgments rendered herein, viz:

First Assignment of Error.

The supreme court of Texas erred in affirming the judgments below against plaintiffs in error, J. M. Avery, C. C. Cobb, and H. I. Phillips, for any amount and in rendering judgment against them for any amount, because all of said judgments are contrary to the law, evidence, and facts, in that the pleadings, evidence, and facts showed that all of the property sued for was legal-y levied upon *the* the United States marshal for the northern district of Texas under a valid execution issued from the United States circuit court for the northern district of Texas, at Dallas, Texas, based upon a valid judgment rendered by said court, and was legally sold by said marshal, and that all of said property belonged to J. H. Cooke, the defendant in said judgment and execution, and was legally levied upon and sold thereunder and a good title to same passed to the purchaser at said sale, and that the mortgage sued on was void as against said execution and the purchaser thereunder, and said plaintiffs in error claimed under said execution and sale thereunder and said purchaser, and the evidence fails to show that defendants in error had selected any animals branded, marked, and

aged as described in said mortgage, and said judgment failed to give full force and effect to said execution, levy, and sale and the acts of said marshal thereunder, and *are* against the right, title, commission, authority, and immunity specially set up and claimed by said plaintiffs in error under said execution and the laws of the United States and the judgment and courts thereof.

273 *Second Assignment of Error.*

The supreme court of Texas erred in affirming the judgments below and in rendering judgment against plaintiffs in error, J. M. Avery, C. C. Cobb, and H. I. Phillips, and in holding that the alleged mortgage sued on was valid as against the above-mentioned judgment and execution of the United States circuit court and the levy and sale thereunder by said United States marshal, and in holding that the mortgagee could recover against the purchaser at such sale and those claiming under him the value of 50 cows and three horses and mules, because, as appears from the evidence, the findings of fact, and the opinion of said supreme court and the record herein, said mortgage was invalid as against such execution, sale, and purchaser, in this, to wit, at the time said mortgage was given there were many more animals of the same description mingled with those upon which the mortgage was attempted to be given, but the animals attempted to be covered by the mortgage were not separated from the others of the same description with which they were mingled, nor was there such separation up to the time said execution from the United States court was levied on the property in controversy, nor had the mortgagee in any way attempted to make a selection of any animals, and the animals involved in this case being a part of a larger number of the same description, and not having been separated nor identified, no lien attached to any particular animals in the herd and no right attached under the attempted mortgage to any specific animals, nor did it give a lien upon an undivided interest in the herd, and, as a matter of law, said mortgage was invalid as against said execution, levy, and sale, and said property passed to the purchaser at said execution sale and the plaintiffs in error, claiming under him, free from any claims or rights therein by said mortgagee, and said judgment of said supreme court of Texas is against the rights and title specially claimed under said judgment of the United States circuit court and execution sale and the acts of said United States marshal, and fails to give full force and

274 effect to the same, the decision in this case being the first one by the supreme court of Texas or any other supreme court holding such an attempted mortgage valid against execution creditors.

Third Assignment of Error.

The supreme court of Texas erred in affirming the judgments below and in rendering judgment against said plaintiffs in error for $850.00, because from the opinion of said supreme court and the record herein it clearly appears that at most plaintiffs in error were

only liable for the value of 50 cows of the value of $13.00 per head, and this would only amount to $650.00, and the additional $200.00 consists of the value of one bay mare colt, one bay horse colt and one black mule colt, and said mortgage sued on did not attach to or cover said three colts, they having separated from their dams before any right of selection was exercised, and said colts were duly levied on and sold by said United States marshal under the above-mentioned judgment and execution from said United States court, and they belonged to the defendant in said execution, and title passed by said sale and plaintiffs in error claimed under said sale, and to this extent, at least, said judgment of said supreme court of Texas is against the right and title specially claimed under said United States circuit court judgment and execution sale and the acts of said United States marshal, and fails to give full force and effect to same.

Fourth Assignment of Error.

The supreme court of Texas erred in affirming the judgments below, and in rendering judgment against said plaintiffs in error, and in holding that the mortgage sued on was good as against them, because the undisputed evidence and the facts showed as a matter of law that the mortgage sued on, in connection with the acts of the mortgagor and mortgagee, was fraudulent and void as against the creditors of the mortgagor and those claiming under such creditors,
in that the mortgagor, J. H. Cooke, was insolvent, and with
275 the consent of the mortgagee he sold $800.00 worth of the mortgaged property, and with said consent retained and used $200.00 of said money for his own use and benefit, and plaintiffs in error claimed under a judgment against said J. H. Cooke, rendered by the United States circuit court for the northern district of Texas long before the giving of said mortgage, and under a valid execution issued on said judgment by said court and a valid levy and sale thereunder by the United States marshal for the northern district of Texas, and said judgment of said supreme court of Texas is against the right and title specially claimed under said United States circuit court judgment and execution sale and the acts of said United States marshal, and fails to give full force and effect to same.

Fifth Assignment of Error.

The supreme court of Texas erred in affirming the judgments below and in rendering judgment against said plaintiffs in error for $850.00, the alleged value of 50 cows and three colts, because, under the circumstances of this case, the findings of fact as to the value of said animals and the evidence upon which said findings were based did not, as a matter of law, furnish a proper basis or measure of damages by which judgment could be rendered against them, in that said findings established said values at the time of the last trial of this case in November, 1897, and not their value at the time the sequestration proceedings occurred or the conversion, if any, took place in June, 1893, and said judgment of said supreme

court applies a different rule and allows greater damages when a sale is made under a valid execution from the United States court by the United States marshal from that applied and allowed when a sale is made under an execution from a State court by a State sheriff or other State officer in similar cases, and thereby said judgment of said supreme court discriminates adversely, unjustly, and illegally against sales made under executions by United States marshals contrary to the provisions of the Revised Statutes of the United States, sec. 916 and 788, and said judgment of
276 said supreme court fails to give full force and effect to said execution from said United States circuit court and the levy, sale, and acts of said marshal thereunder and is against the right, title, commission, authority, and immunity specially set up and claimed by said plaintiffs in error under said execution and the laws of the United States and the judgment and courts thereof.

Wherefore plaintiffs in error pray that said judgment of said supreme court of Texas and the judgments below be reversed and judgment be rendered for plaintiffs in error and for such other orders and judgments as the law and the record may require.

COBB & AVERY,
JOHN M. AVERY,
Attorneys for Plaintiffs in Error, J. M. Avery, C. C. Cobb, & H. I. Phillips.

Endorsed: No. —. J. M. Avery *et al.*, plaintiffs in error, *vs.* I. Popper & Brother *et al.*, defendants in error. Assignment of errors. Filed in supreme court May 9th, 1899. Chas. S. Morse, clerk.

277 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

To the honorable the judges of the supreme court of the State of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Texas, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between John M. Avery, Charles C. Cobb, and H. I. Phillips, plaintiffs in error, and I. Popper and E. Popper, composing the firm of I. Popper and Brother, and R. R. Neyland, composing the firm of R. R. Neyland & Co., and J. H. Cooke, M. E. Cooke, W. W. Avery, W. H. Bush, and S. J. Mason, defendants in error, and numbered 720 on the docket of said court, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the con-
278 struction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and

the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said John M. Avery, Charles C. Cobb, and H. I. Phillips, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the second day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
E. D. WHITE,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] J. M. Avery *et al.*, plaintiffs in error, *vs.* I. Popper & Brother *et al.*, defendants in error. Original writ of error. Filed in my office this 9th day of May, 1899, and at the same time there was also filed in my office a true copy of this writ. Chas. S. Morse, clerk supreme court of Texas.

279 UNITED STATES OF AMERICA, *ss*:

To I. Popper and E. Popper, composing the firm of I. Popper and Brother, and R. R. Neyland, composing the firm of R. R. Neyland and Co., and J. H. Cooke, M. E. Cooke, W. W. Avery, W. H. Bush, and S. J. Mason, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of Texas, wherein John M. Avery, Charles C. Cobb, and H. I. Phillips are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, associate justice of the Supreme Court of the United States, this second day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

E. D. WHITE,
Associate Justice of the Supreme Court of the United States.

On this 11th day of May, in the year of our Lord one thousand eight hundred and ninety-nine, personally appeared R. B. Robinson before me, the subscriber, a notary public in and for Dallas county, State of Texas, and makes oath that he delivered a true copy of the within citation to E. Popper, a member of the firm of I. Popper & Brother; R. R. Neyland, composing the firm of R. R. Neyland & Co.; W. H. Bush, and S. J. Mason, each in person, and B. F. Looney, a member of the firm of Craddock & Looney, attorneys for defendants in error, on May 9th, 1899, and to M. E. Cooke, defendant in error, in person, on May 10th, 1899, a true copy of said citation being delivered by me to each of said persons on above dates.

R. B. ROBINSON.

Sworn to and subscribed the 11th day of May, A. D. 1899.

[Seal of Notary Public, County of Dallas, Texas.]

E. E. LINSLEY,
Notary Public in and for Dallas County, State of Texas.

280 JOHN M. AVERY ET AL., Plaintiffs in Error, *vs.* I. POPPER & BRO. ET AL., Defendants in Error. } No. —. Acceptance of Service.

We, the undersigned defendants in error in the above case, hereby acknowledge that we have this day been duly served with a true copy of the hereto-attached citation in error in the above case, dated May 2nd, 1899, signed by the Honorable Edward D. White, associate justice of the United States Supreme Court, and citing the defendants in error in the above case to appear at a Supreme Court of the United States, at Washington, D. C., within thirty days from the date thereof, and show cause why the judgment in the above case rendered by the supreme court of Texas against plaintiffs in error should not be corrected, etc.

This the 9th day of May, 1899.

I. POPPER & BRO.,
R. R. NEYLAND,
W. H. BUSH, AND
S. J. MASON,
By B. F. LOONEY,
Of Counsel for Def'ts in Error.

Witness:
R. B. ROBINSON.

281 JOHN M. AVERY ET AL., Plaintiffs in Error, *vs.* I. POPPER & BRO. ET AL., Defendants in Error. } No. —. Acceptance of Service.

We, the undersigned defendants in error in the above case, hereby acknowledge that we have this day been duly served with a true

copy of the hereto-attached citation in error in the above case, dated May 2nd, 1899, signed by the Honorable Edward D. White, associate justice of the United States Supreme Court, and citing the defendants in error in the above case to appear at a Supreme Court of the United States, at Washington, D. C., within thirty days from the date thereof, and show cause why the judgment in the above case rendered by the supreme court of Texas against plaintiffs in error should not be corrected, etc.

This the 11th day of May, 1899.

W. W. AVERY.

282 JOHN M. AVERY ET AL., Plaintiffs in Error, *vs.* I. POPPER & BRO. ET AL., Defendants in Error. } No. —. Proof of Service.

Before me, the undersigned authority, on this day personally appeared J. W. French, known to me to be a credible and responsible citizen over the age of twenty-one years, and having been by me duly sworn, makes oath and says that on the 10th day of May, 1899, he delivered to each of the following-named defendants in error in the above case in person, to wit, J. H. Cooke, a true copy of the hereto-attached citation in error in above case, dated May 2nd, 1899, signed by the Honorable Edward D. White, associate justice of the United States Supreme Court, and citing the defendants in error in the above case to appear at a Supreme Court of the United States, at Washington, D. C., within thirty days from the date thereof and show cause why the judgment in the above case rendered by the supreme court of Texas against plaintiffs in error should not be corrected, etc.

J. W. FRENCH.

Sworn to and subscribed before me this the 10th day of May, 1899.

[Seal of J. C. Ripley, Notary Public, Leavenworth County, Kans.]

JOHN C. RIPLEY,
Notary Public.

My com. expires Sept. 1st, 1900.

283 [Endorsed:] J. M. Avery *et al.*, pl'ffs in error, *vs.* I. Popper & Bro. *et al.*, def'ts in error. Original. Citation in error & returns of service.

284 CLERK'S OFFICE, SUPREME COURT OF TEXAS.

I, Charles S. Morse, clerk of the supreme court of Texas, hereby certify that the foregoing two hundred and eighty-three pages contain a full, true, and correct copy of the judgments, record, and all the proceedings in cause No. 720, entitled John M. Avery *et al.*, plaintiffs in error, *vs.* I. Popper & Brother *et al.*, defendants in error, as the same appears from the records and papers pertaining to said

cause now on file in this office, except that the original writ of error from the United States Supreme Court and the original citation in error and the proof and acknowledgment of service thereof are hereto attached and returned herewith instead of copies thereof.

Witness my hand and the seal of the said supreme court of Texas, at the city of Austin, Texas, this the 17th day of May, A. D. 1899.

Seal Supreme Court of the State of Texas.

CHAS. S. MORSE,
Clerk Supreme Court of Texas.

285 In the Supreme Court of the United States.

J. M. AVERY ET AL., Plaintiffs in Error,
vs.
I. POPPER & BROTHER ET AL., Defendants in Error. } No. —.

In pursuance of rule 10, section 9, Rules of the Supreme Court of the United States, plaintiffs in error in the above case hereby state that they intend to rely upon all of the errors fully set out and embraced in their five assignments of error filed herein and found in the written record on pages 271 to 276, inclusive, and a copy of which *are* hereto attached and made a part hereof, said errors being, substantially, (1) that the mortgage sued on was invalid as against the judgment, execution, and sale from the United States circuit court, as set out more fully in said first and second assignments of error; (2) that the judgment below is erroneous to the extent of $200.00, the value of three colts, as set out more fully in said third assignment of error; (3) that the mortgage sued on in connection with the acts of the mortgagor is fraudulent and void as against said judgment, execution, and sale, as set out more fully in said fourth assignment of error, and (4) that a different and greater measure of damages is applied to a sale by United States marshall from that applied to State officers, as set out more fully in said fifth assignment of error; and all of the parties in this case hereby agree that they think that only the following parts of the written record are necessary for the consideration of said errors, and agree that the clerk shall cause to be printed only the following parts of said written record, to wit:

Pages.
(69–73)—1. First amended consolidated pleading of plaintiffs.
(74–82)—2. Second amended original answer of defendants.
(82–84)—3. First amendment to first supplemental petition of plaintiffs.
(88–91)—4. Judgment of the trial court.
(100–144)—5. Statement of facts.
(97–99)—6. Findings of fact and conclusions of law filed by the district court.
(149–156)—7. Assignments of error in the district court.

286 8. Cross-assignments of error filed by appellees in the State court in words and figures as follows, to wit:

In the Court of Civil Appeals, 5th Supreme Judicial District of Texas.

JOHN M. AVERY ET AL., Appellants,
vs.
I. POPPER & BRO. ET AL., Appellees.

Now come the appellees and make the following cross-assignments of error:

1. The court erred in quashing all the sequestration proceedings sued out by I. Popper & Bro. and R. R. Neyland & Co. in the separate suits originally instituted by each.

2. The court erred in adjudging that appellees pay all costs created by reason of the institution of said sequestration proceedings.

3. The court erred in adjudging against appellees the payment of all costs created in the 2 suits up to Jan. 17th, 1894, the date of the filing of the consolidated pleading.

4. The court erred in refusing to foreclose the lien of appellees I. Popper & Bro. and R. R. Neyland & Co. on the 17 two-year-old steers and 33 two-year-old heiffers, and in refusing to give appellees judgment against appellants; also for the value of said 17 head of steers and 33 head of heiffers (their value being as follows, as found by the court: $534.00), together with 6 per cent. interest thereon.

CRADDOCK & LOONEY,
Attorneys for Appellees.

The said above cross-assignments of error are not included in the written record sent up, but they formed a part of the record of the case below, and it is agreed that the same may be printed as a part of the record of this case.

(160–172)— 9. Findings of fact, opinion and judgment of the court of civil appeals.

(217)—10. Order granting writ of error by the State supreme court.

(218–226)—11. First opinion of State supreme court, Dec. 19th, 1898.

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(240–249)—12. Motion for rehearing filed by defendants in error in the State supreme court.

(249–251)—13. Second opinion of State supreme court, Jan. 30th, 1899.

(260)—14. Third opinion of State supreme court, March 23rd, 1899.

(261–262)—15. Last judgment of the State supreme court, March 23rd, 1899.

(262–267)—16. Last motion for rehearing filed by plaintiffs in error in the State supreme court.

(267)—17. Last order overruling motion for rehearing, April 20th, 1899.

(268)—18. Petition for writ of error to the United States Supreme Court.
(269)—19. Order allowing writ of error to the United States supreme court.
(269–271)—20. Writ of error bond to the United States Supreme Court.
(271–276)—21. Assignments of error on writ of error.
(277–278)—22. Original writ of error.
(279–282)—23. Original citation in error and service thereof.
(284)—24. Clerk's certificate.

JOHN M. AVERY,
COBB & AVERY,
Attorneys for Plaintiffs in Error.
J. M. McCORMICK,
CRADDOCK & LOONEY,
Attorneys for Defendants in Error.

288 JOHN M. AVERY ET AL., Plaintiffs in Error,
vs.
I. POPPER & BROTHER ET AL., Defendants in Error. } No. —.

In connection with the writ of error to the Supreme Court of the United States, granted and allowed in above case, now comes the plaintiffs in error herein, J. M. Avery, C. C. Cobb, and H. I. Phillips, and say that there were errors committed by the supreme court of Texas and the court of civil appeals and district court in the above cause, and that there were errors in the record, proceedings, and final judgments therein, as of record is manifest, and said plaintiffs in error allege and assign the following errors, for which they ask a reversal of the judgment rendered herein, viz:

First Assignment of Error.

The supreme court of Texas erred in affirming the judgments below against plaintiffs in error, J. M. Avery, C. C. Cobb, and H. I. Phillips, for any amount, and in rendering judgment against them for any amount, because all of said judgments are contrary to the law, evidence, and facts, in that the pleadings, evidence, and facts showed that all of the property sued for was legally levied upon by the United States marshal for the northern district of Texas under a valid execution issued from the United States circuit court for the northern district of Texas, at Dallas, Texas, based upon a valid judgment rendered by said court, and was legally sold by said marshal, and that all of said property belonged to J. H. Cooke, the defendant in said judgment and execution, and was legally levied upon and sold thereunder, and a good title to same passed to the purchaser at said sale, and that the mortgage sued on was void as against said execution and the purchaser thereunder, and said plaintiffs in error claimed under said execution and sale thereunder and said purchaser, and the evidence fails to show that defendants in error had selected any animals branded, marked, and aged as do

scribed in said mortgage, and said judgment failed to give
289 full force and effect to said execution, levy, and sale, and the acts of said marshall thereunder, and *are* against the right, title, commission, authority, and immunity specially set up and claimed by said plaintiffs in error under said execution and the laws of the United States and the judgment and courts thereof.

Second Assignment of Error.

The supreme court of Texas erred in affirming the judgments below and in rendering judgment against plaintiffs in error, J. M. Avery, C. C. Cobb, and H. I. Phillips, and in holding that the alleged mortgage sued on was valid as against the above-mentioned judgment and execution of the United States circuit court, and the levy and sale thereunder by said United States marshall, and in holding that the mortgagee could recover against the purchaser at such sale, and those claiming under him, the value of 50 cows and three horses and mules, because, as appears from the evidence, the findings of fact, and the opinion of said supreme court and the record herein, said mortgage was invalid as against such execution, sale, and purchaser, in this, to wit: At the time said mortgage was given there were many more animals of the same description mingled with those upon which the mortgage was attempted to be given, but the animals attempted to be covered by the mortgage were not separated from the others of the same description with which they were mingled, nor was there such separation up to the time said execution from the United States court was lev-ed on the property in controversy, nor had the mortgagee in any way attempted to make a selection of any animals, and the animals involved in this case being a part of a larger number of the same description, and not having been separated nor identified, no lien attached to any particular animals in the herd, and no right attached under the attempted mortgage to any specific animals, nor did it give a lien upon an undivided interest in the herd, and as a matter of law said mortgage was invalid as against said execution, levy, and sale, and said property passed to the purchaser at said execution sale, and the plaintiffs in error claiming under him, free from any
290 claims or rights therein by said mortgagee, and said judgment of said supreme court of Texas is against the rights and title specially claimed under said judgment of the United States circuit court and execution sale and the acts of said United States marshall, and fails to give full force and effect to the same, the decision in this case being the first one by the supreme court of Texas or any other supreme court holding such an attempted mortgage valid against execution creditors.

Third Assignment of Error.

The supreme court of Texas erred in affirming the judgments below and in rendering judgment against said plaintiffs in error for $850.00, because from the opinion of said supreme court and the

record herein it clearly appears that at most plaintiffs in error were only liable for the value of 50 cows of the value of $13.00 per head, and this would only amount to $650.00, and the additional $200.00 consists of the value of one bay mare colt, one bay horse colt, and one black mule colt, and said mortgage sued on did not attach to or cover said three colts, they having separated from their dams before any right of selection was exercised, and said colts were duly levied on and sold by said United States marshal under the above-mentioned judgment and execution from said United States court, and they belonged to the defendant in said execution and title passed by said sale and plaintiffs in error claimed under said sale, and to this extent, at least, said judgment of said supreme court of Texas is against the right and title specially claimed under said United States circuit court judgment and execution sale and the acts of said United States marshal, and fails to give full force and effect to same.

Fourth Assignment of Error.

The supreme court of Texas erred in affirming the judgments below and in rendering judgment against said plaintiffs in error and in holding that the mortgage sued on was good as against them, because the undisputed evidence and the facts showed as a matter of law that the mortgage sued on in connection with the acts of the mortgagor and mortgagee was fraudulent and void as against the creditors of the mortgagor and those claiming under such creditors, in that the mortgagor, J. H. Cooke, was insolvent, and with the consent of the mortgagee he sold $800.00 worth of the mort-
291 gaged property, and with said consent retained and used $200.00 of said money for his own use and benefit, and plaintiffs in error claimed under a judgment against said J. H. Cooke rendered by the United States circuit court for the northern district of Texas long before the giving of said mortgage, and under a valid execution issued on said judgment by said court, and a valid levy and sale thereunder by the United States marshal for the northern district of Texas, and said judgment of said supreme court of Texas is against the right and title specially claimed under said United States circuit court judgment and execution sale and the acts of said United States marshal, and fails to give full force and effect to same.

Fifth Assignment of Error.

The supreme court of Texas erred in affirming the judgments below and in rendering judgment against said plaintiffs in error for $850.00, the alleged value of 50 cows and three colts, because, under the circumstances of this case, the findings of fact as to the value of said animals and the evidence upon which said findings were based did not, as a matter of law, furnish a proper basis or measure of damages by which judgment could be rendered against them, in that said findings established said values at the time of the last trial of this case in November, 1897, and not their value at the time the sequestration proceedings occurred or the conversion, if

any, took place in June, 1893, and said judgment of said supreme court applies a different rule and allows greater damages when a sale is made under a valid execution from the United States court by the United States marshal from that applied and allowed when a sale is made under an execution from a State court by a State sheriff or other State officer in similar cases, and thereby said judgment of said supreme court discriminates adversely, unjustly, and illegally against sales made under executions by United States marshal*s*, contrary to the provisions of the Revised Statutes of the United States, sec. 916 and 788, and said judgment of said supreme court fails to give full force and effect to said
292 execution from said United States circuit court, and the levy, sale, and acts of said marshal*l* thereunder, and is against the right, title, commission, authority, and immunity specially set up and claimed by said plaintiffs in error under said execution and the laws of the United States and the judgment and courts thereof.

Wherefore plaintiffs in error pray that said judgment of said supreme court of Texas and the judgments below b*e* reversed, and judgment be rendered for plaintiffs in error and for such other orders and judgments as the law and the record may require.

COBB & AVERY,
JOHN M. AVERY,
Attorneys for Plaintiffs in Error, J. M. Avery, C. C. Cobb, & H. I. Phillips.

293 [Endorsed:] No. —. J. M. Avery *et al.*, plaintiffs in error, *vs.* I. Popper & Bro. *et al.*, defendants in error. Agreement as to the parts of the record to be printed.

294 [Endorsed:] File No., 17,426. Supreme Court U. S., October term, 1899. Term No., 312. John M. Avery *et al.*, pl'ffs in error, *vs.* I. Popper *et al.*, &c. Assignment of errors and stipulation as to parts of record to be printed. Filed Aug. 14, 1899.

Endorsed on cover: File No., 17,426. Texas supreme court. Term No., 312. John M. Avery, Charles C. Cobb, and H. I. Phillips, plaintiffs in error, *vs.* I. Popper and E. Popper, composing the firm of I. Popper & Brother, *et al.* Filed May 24th, 1899.

Filed April 4, 1900

Supreme Court of the United States.

OCTOBER TERM, 1899.

NO. 312.

JOHN M. AVERY, CHAS. C. COBB AND S. T. PHILLIPS,

Plaintiffs in Error,

v.

I. POPPER & BRO. AND R. R. NEYLAND ET AL.,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

BRIEF FOR PLAINTIFFS IN ERROR.

JOHN M. AVERY,

Attorney for Plaintiffs in Error.

Supreme Court of the United States,

OCTOBER TERM, 1899.

NO. 312.

JOHN M. AVERY, CHAS. C. COBB AND H. I. PHILLIPS,
Plaintiffs in Error,

v.

I. POPPER & BRO. AND R. R. NEYLAND Et Al,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

On June 10th, 1889, in the Circuit Court of the United States for the Northern District of Texas, W. W. Avery recorded a judgment against J. H. Cooke for $2,600.00 and interest. By writ of error Cooke carried the case to the Supreme Court of the United States, where it was affirmed against him on January 23, 1893 (see Cooke v. Avery, 147 U. S. 375). The mandate was sent down, and, on June 5, 1893, judgment was entered on it by the United States Circuit Court ordering execution to issue

against him for the amount (Record p. 33). On June 8, 1893, an execution was duly issued thereon against him by said United States Circuit Court, and was placed in the hands of the United States marshal for the Northern District of Texas, who levied on the property in controversy, as the property of said Cooke, on June 15, 1893, and sold the property June 28, 1893, to W. W. Avery, and it was delivered to his attorney, John M. Avery (Record pp. 34 and 35).

On May 26, 1891, J. H. Cooke attempted to give a chattel mortgage on certain property to secure a note in favor of T. H. King. This paper described the property as being 50 cows branded Cooke OK, with spring calves following the cows, and also five mares branded J 6, with colts following the mares, all being in a pasture in Hunt county, Texas (Record pp. 25 and 26). At the time this paper was given the mortgagor had in this pasture 100 similar cows with calves following them and 10 similar mares with colts following them, all mingled together, and nothing was ever done towards separating or designating those attempted to be mortgaged (Record pp. 25, 36, 40 and 43). The United States marshal, under the above execution, levied on, seized and sold the whole herd as the property of J. H. Cooke, to W. W. Avery, and delivered the animals to his attorney, J. M. Avery (Record p. 34). On this point the Supreme Court of Texas found as follows: "At the time the mortgage was executed to secure the note there were many more animals of the same description mingled with those upon which the mortgage was given * * *, but the animals covered by the mortgage were not separated from the others of the same description with which they were mingled,

nor was there such separation when the execution in favor of Avery was levied upon the property in controversy" (Record p. 64).

The defendants in error claimed to own the above note in favor of King, and on June 29, 1893, they brought these suits in the State court to foreclose this alleged mortgage, and sued out writs of sequestration, under which the State sheriff seized fifty cows, seventeen 2-year-old steers, thirty-three 2-year-old heifers and one mare 2 years old, one horse 2 years old and one mule 2 years old. It was claimed by defendants in error that these steers and heifers were calves in 1891, and that said mare, horse and mule were colts in 1891. Plaintiff in error J. M. Avery gave a replevy bond with C. C. Cobb and H. I. Phillips as sureties, and regained possession of this property and sold it. Defendants in error alleged that J. M. Avery had converted the property, and asked damages for its value against him and his sureties (Record pp. 1 to 4).

The plaintiffs in error pleaded the above facts, and have insisted upon and urged throughout this litigation that this mortgage was invalid as against them, and that the levy of the execution by the United States marshal created a lien on the property superior to the alleged mortgage lien, and that the sale by said marshal passed title to the property to them and those under whom they claimed free from the rights or liens of the mortgagee. This was presented below by their pleading, motion for new trial, assignments of error, motion for rehearing, &c. (Record pp. 6, 53, 78 and 79). They also pleaded and urged that the mortgage was fraudulent and void as against them because the mortgagor was insolvent, and had been

allowed by the mortgagee to sell some of the mortgaged property and to keep the proceeds for his own use, and that at least the mortgage was invalid as to the colts, and that a different and higher measure of damages was applied in this case from that applied for a conversion by a State sheriff under similar circumstances (Record pp. 6, 50, 80 and 81).

The judiciary system of appellate courts in Texas is in many respects similar to that of the United States. There are five courts of civil appeals to which appeals and writs of error are taken from the trial court. If the judgment is affirmed and the Supreme Court thinks the affirmance wrong, a writ of error may be obtained from that court carrying the case to the Supreme Court of the State.

This case was first tried in 1894 and judgment rendered against plaintiffs in error, but on appeal by them the mortgage was held invalid, and the judgment was reversed and the case remanded by the Court of Civil Appeals of the FIFTH Supreme Judicial District (see Avery v. Popper, 34th Southwestern Reporter, 325). On a second trial in November, 1897, judgment was again rendered against plaintiffs in error for $850.00. This was for the value, at the time of the trial, of the 50 cows and the mare, horse and mule, but not for the steers and heifers (Record pp. 12 and 13). On a second appeal by plaintiffs in error this judgment was affirmed by the Court of Civil Appeals of the FOURTH Supreme Judicial District, and judgment was also rendered against them for the value of the steers and heifers. This court overruled the holding on the first appeal (Record pp. 53 to 61). The Supreme Court of Texas then granted a writ

of error (Record p. 62). That court rendered three judgments, and by the last one it reversed the judgment of the Court of Civil Appeals as to the steers and heifers and affirmed the judgment of the trial court for $850.00, the value of the cows, mare, horse and mule. The Supreme Court held: (1) that defendants in error could recover the value of the 50 cows; (2) that they could not recover the value of the 50 calves; and (3) that they could recover the value of the three colts (Record pp. 62 to 68 and 76 to 77). This was the first and only decision of this question by the Supreme Court of Texas.

To this decision and judgment a writ of error was allowed by Hon. E. D. White, associate justice of this Court (Record p. 82), and plaintiffs in error have duly filed and now present and urge the following specification of errors (Record pp. 84 to 87), viz.:

FIRST ASSIGNMENT OF ERROR.

The Supreme Court of Texas erred in affirming the judgments below against plaintiffs in error, J. M. Avery, C. C. Cobb and H. I. Phillips for any amount, and in rendering judgment against them for any amount, because all of said judgments are contrary to the law, evidence and facts, in that, the pleadings, evidence and facts showed that all of the property sued for was legally levied upon by the United States marshal for the Northern District of Texas under a valid execution issued from the United States Circuit Court for the Northern District of Texas, at Dallas, Texas, based upon a valid judgment rendered by said court, and was legally sold by said marshal, and that all of said property belonged to J. H. Cooke, the defendant in said

judgment and execution, and was legally levied upon and sold thereunder, and a good title to same passed to the purchaser at said sale, and that the mortgage sued on was void as against said execution and the purchaser thereunder, and said plaintiffs in error claimed under said execution and sale thereunder and said purchaser, and the evidence fails to show that defendants in error had selected any animals branded, marked and aged as described in said mortgage, and said judgment failed to give full force and effect to said execution, levy and sale, and the acts of said marshal thereunder, and are against the right, title, commission, authority and immunity specially set up and claimed by said plaintiffs in error under said execution and the laws of the United States and the judgment and courts thereof (Record p. 84).

SECOND ASSIGNMENT OF ERROR.

The Supreme Court of Texas erred in affirming the judgments below, and in rendering judgment against plaintiffs in error, J. M. Avery, C. C. Cobb and H. I. Phillips, and in holding that the alleged mortgage sued on was valid as against the above mentioned judgment and execution of the United States Circuit Court, and the levy and sale thereunder by said United States marshal, and in holding that the mortgagee could recover against the purchaser at such sale, and those claiming under him, the value of 50 cows and three horses and mules, because, as appears from the evidence, the findings of fact and the opinion of said Supreme Court and the record herein, said mortgage was invalid as against such execution, sale and purchaser in this, to-wit: At the time said mortgage was given there were many more animals of the same

description mingled with those upon which the mortgage was attempted to be given, but the animals attempted to be covered by the mortgage were not separated from the others of the same description with which they were mingled, nor was there such separation up to the time said execution from the United States Court was levied on the property in controversy, nor had the mortgagee in any way attempted to make a selection of any animals, and the animals involved in this case being a part of a larger number of the same description, and not having been separated nor identified no lien attached to any particular animals in the herd, and no right attached under the attempted mortgage to any specific animals, nor did it give a lien upon an undivided interest in the herd, and as a matter of law said mortgage was invalid as against said execution, levy and sale, and said property passed to the purchaser at said execution sale and the plaintiffs in error claiming under him, free from any claims or rights therein by said mortgagee, and said judgment of said Supreme Court of Texas is against the rights and title specially claimed under said judgment of the United States Circuit Court, and execution sale, and the acts of said United States marshal, and fails to give full force and effect to the same, the decision in this case being the first one by the Supreme Court of Texas or any other supreme court holding such an attempted mortgage valid against execution creditors (Record p. 85).

THIRD ASSIGNMENT OF ERROR.

The Supreme Court of Texas erred in affirming the judgments below, and in rendering judgment against said plaintiffs in error for $850.00,

because from the opinion of said Supreme Court, and the record herein, it clearly appears that at most, plaintiffs in error were only liable for the value of 50 cows of the value of $13.00 per head, and this would only amount to $650.00, and the adtional $200.00 consists of the value of one bay mare colt, one bay horse colt, and one black mule colt, and said mortgage sued on did not attach to or cover said three colts, they having separated from their dams before any right of selection was exercised, and said colts were duly levied on and sold by said United States marshal under the above mentioned judgment and execution from said United States Court, and they belonged to the defendant in said execution, and title passed by said sale, and plaintiffs in error claimed under said sale, and to this extent, at least, said judgment of said Supreme Court of Texas is against the right and title specially claimed under said United States Circuit Court judgment and execution sale, and the acts of said United States marshal, and fails to give full force and effect to same (Record pp. 85 and 86).

FOURTH ASSIGNMENT OF ERROR.

The Supreme Court of Texas erred in affirming the judgments below and in rendering judgment against said plaintiffs in error, and in holding that the mortgage sued on was good as against them, because the undisputed evidence and the facts showed, as a matter of law, that the mortgage sued on in connection with the acts of the mortgagor and mortgagee was fraudulent and void as against the creditors of the mortgagor and those claiming under such creditors, in that, the mortgagor, J. H. Cooke, was insolvent, and with

the consent of the mortgagee he sold $800.00 worth of the mortgaged property, and with said consent retained and used $200.00 of said money for his own use and benefit, and plaintiffs in error claimed under a judgment against J. H. Cooke, rendered by the United States Circuit Court for the Northern District of Texas long before the giving of said mortgage, and under a valid execution issued on said judgment by said court, and a valid levy and sale thereunder by the United States marshal for the Northern District of Texas, and said judgment of said Supreme Court of Texas is against the right and title specially claimed under said United States Circuit Court judgment and execution sale, and the acts of said United States marshal, and fails to give full force and effect to same. (Record p. 86).

FIFTH ASSIGNMENT OF ERROR.

The Supreme Court of Texas erred in affirm- the judgments below, and in rendering judgment against said plaintiffs in error for $850.00, the alleged value of 50 cows and 3 colts, because, under the circumstances of this case, the findings of fact, as to the value of said animals, and the evidence upon which said findings were based, did not, as a matter of law, furnish a proper basis or measure of damages by which judgment could be rendered against them, in that, said findings established said values at the time of the last trial of this case in November, 1897, and not their value at the time the sequestration proceedings occurred, or the conversion, if any, took place in June, 1893, and said judgment of said Supreme Court applies a different rule and allows greater damages when a sale is made under a valid execution from the Uni-

ted States Court by the United States marshal from that applied and allowed when a sale is made under an execution from a State court by a State sheriff, or other State officer, in similar cases, and thereby said judgment of said Supreme Court discriminates adversely, unjustly and illegally against sales made under executions by United States marshals, contrary to the provisions of the Revised Statutes of the United States, Secs. 916 and 788, and said judgment of said Supreme Court fails to give full force and effect to said execution from said United States Circuit Court, and the levy, sale and acts of said marshal thereunder, and is against the right, title, commission, authority and immunity specially set up and claimed by said plaintiffs in error under said execution, and the laws of the United States, and the judgment and courts thereof (Record pp. 86 and 87).

FIRST PRELIMINARY PROPOSITION.

The Supreme Court of the United States has jurisdiction of this case.

AUTHORITIES.

Clement v. Berry, 11 Howard, 398.

Buck v. Colbath, 70 U. S. 334.

Stanley v. Schwalby, 162 U. S. 255.

Etheridge v. Sperry, 139 U. S. 266.

Pittsburg, &c., R. R. v. Long Island, &c., Co., 172 U. S. 493.

Bock v. Perkins, 139 U. S. 628.

Collier v. Stanbrough 6 Howard (U. S.) 14 and 20.

Hurst v. Cobb & Avery, 61 Fed. Rep. 1.

In Clement v. Berry, supra, on writ of error to the Supreme Court of Tennessee, Justice McLean says: "The jurisdiction of this court is the first question to be considered. The plaintiff sets up a lien on certain personal property under a judgment rendered by the Circuit Court of the United States, held for the Middle District of Tennessee. The defendant asserts a lien under a deed of trust for the property from Chas. F. Berry, and the Supreme Court of Tennessee held that the lien of the deed was paramount to that of the judgment. This brings the case within the twenty-fifth section, as the decision was against the right asserted by Clement, under the authority of the United States."

In Stanley v. Schwalby, supra, on writ of error to the Supreme Court of Texas, Justice Gray says: "For instance, if a marshal of the United States takes personal property upon attachment upon mesne process issued by a court of the United States, and is sued in an action of trespass in a State court by one claiming title to the property, and sets up his authority under the United States, and judgment is rendered against him in the highest court of the State, he may bring the case by writ of error to this court." Citing Bock v. Perkigs and most of the other cases cited above.

In Bock v. Perkins, supra, Justice Harlan says: "A case, therefore, depending upon the inquiry whether a marshal or his deputy has rightfully executed a lawful precept directed to the former from a court of the United States is one arising under the laws of the United States."

Etheridge v. Sperry, supra, on writ of error to the Supreme Court of Iowa, was a suit against a deputy marshal by mortgagee for levying on cer-

tain property claimed to be covered by a chattel mortgage, and it was held that the United States Supreme Court had jurisdiction.

Buck v. Colbath, supra, on writ of error to the Supreme Court of Minnesota, was a suit for the value of goods levied on under an attachment from the United States Circuit Court. Justice Miller says: "There seems to be no reason to doubt that the case comes within the provision of the 25th section of the Judiciary Act. The defendants claimed the protection of an authority exercised under the United States, and the decision was against the protection thus claimed."

The plaintiffs in error in the present case set up and claimed that the judgment and execution of the Federal court and the acts of the United States marshal thereunder created a lien on the property superior to the alleged mortgage lien and passed title to them of the property free from the claims of the defendants in error, and afforded them a complete protection in this case, and the decision was against this contention (Record pp. 6, 7, 53 and 76).

SECOND PRELIMINARY PROPOSITION.

The decision of this question by the State court in this case is not binding or conclusive on the United States Supreme Court, because this is the first decision of this question by the Supreme Court of Texas, and it has not become a settled rule of property, and is not in harmony with previous decisions of that court.

AUTHORITIES.

Clement v. Berry, 11 Howard, 398.
Barber v. Pittsburg, &c., Ry. Co., 166 U. S. 83.
Gibson v. Lyon, 115 U. S. 439.
Burgess v. Seligman, 107 U. S. 20.
Stanley v. Schwalby, 162 U. S. 255.
Buck v. Colbath, 70 U. S. 334.

ARGUMENT.

Clement v. Berry, supra, was on writ of error to the Supreme Court of Tennessee, and the judgment was reversed. The question involved was whether a judgment and execution from the Federal court, levied on certain chattels, created a lien superior to a deed of trust on same. Mr. Justice McLean says: "No other decision of the Supreme Court of Tennessee than the one now before us is applicable to this question, and if the case to be reviewed is to constitute the rule for our decision, as insisted, the power of revision would be useless."

In Stanley v. Schwalby, supra, on writ of error to the Supreme Court of Texas, Justice Gray says: "But so far as the judgment of the State court against the validity of an authority set up by the defendant under the United States necessarily involves a decision of a question of law, it must be reviewed by this court whether that question depends upon the Constitution, laws or treaties of the United States or upon local law, or upon principles of general jurisprudence. For instance, if a marshal of the United States takes personal property upon attachment on mesne process issued by a court of the United States, and is sued in an action of trespass in a State court by one claiming

title in the property, and sets up his authority under the United States, and judgment is rendered against him in the highest court of the State, he may bring the case by writ of error to this court, and as his justification depends upon the question whether the title to the property was in the defendant in attachment or in the plaintiff in the action of trespass, this court upon the writ of error has the power to decide that question so far as it is one of law, even if it depends upon local law or upon general principles."

In Gibson v. Lyon, supra, Justice Matthews says: "As a precedent the decision of the Supreme Court of the State, though single, is entitled to peculiar respect, because all the questions decided arise upon the local laws of the State, but it cannot have conclusive force in the courts of the United States unless it has become a rule of property."

In Barber v. Pittsburg Ry. Co., supra, Justice Gray says: "The question whether the opinion of the Supreme Court of the State in the former action is conclusive evidence of the laws of Pennsylvania in a court of the United States, depends upon the further question whether the opinion is declaratory of the settled law of Pennsylvania as to the effect of such devises, or is a decision upon the construction of this particular devise * * *. But a single decision of the highest court of a State upon the construction of the words of a particular devise is not conclusive evidence of the law of the State."

The question of the validity of a chattel mortgage on a certain number of articles out of a larger number of similar articles, as against a levying execution creditor of the mortgagor, was for the

first time presented to the appellate courts of Texas in this litigation, and the present decision is the first one sustaining its validity by the Supreme Court. On the former appeal of this same case, in 1895, the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, on the same facts held this mortgage invalid as against plaintiffs in error. (See Avery v. Popper, 34th Southwestern Reporter, 325.) This stood as the law of Texas for four years until the present decision by the Supreme Court in 1899.

In 1897 the Supreme Court decided the case of Oxsheer v. Watt, 91st Texas, 124. The proposition contended for by the appellee and sustained by the court in that case was this (p. 124): "Between the mortgagor and mortgagee and their privies any description is good if the parties knew and understood what property the mortgage covered." And the Supreme Court says (p. 128): "The facts certified do not show that W. W. Oxsheer is in any better position to prevent the foreclosure than F. G. Oxsheer (the mortgagor) would have been had the title not passed out of him." It is apparent that the validity of such a mortgage as against a levying execution creditor, a purchaser or other third party, was not decided in that case, but only the rights of the parties to the mortgage. In the case at bar the court says that two questions are presented: One, the validity of the mortgage as between the parties; and, two, if valid between the parties then its validity as against execution creditors (Record p. 65). The court then decides on the first question that it is good between the parties and cites on this Oxsheer v. Watt, supra. (Record p. 66). The court then discusses the second question at length and decides it valid as

against creditors, but cites no authority on this question, but on the contrary undertakes to distinguish other cases from the case at bar.

The decision in the case at bar is not only the first decision by the Supreme Court of Texas on this precise question, but it is inconsistent with prior decisions of the same court on an analogous question—rendered many years before.

In Cleveland v. Williams, 29 Tex. 212 (decided in 1867), the sale of a certain number of articles out of a larger number was held invalid, the court saying: "The goods sold must be separated and identified by marks and numbers so as to be completely distinguished from all other goods, or from the bulk or mass with which they happen to be mixed. * * * But if a given number of the whole are sold no title is acquired by the purchaser until they are separated and their identity is thus ascertained and determined."

In Moss v. Sanger, reported in 12th Southwestern Reporter, 616 (decided in 1889), the Supreme Court of Texas held that a sale of part of a stock of goods which had not been separated from the balance of the stock was invalid as against a creditor who levied an execution on the stock, the court saying: "There being no separation or seggregation of the goods so as to be identified no sale was perfected."

These prior decisions of the Supreme Court of Texas are in point. In Richardson v. Alpina Lumber Co., 40 Mich. 206, such a mortgage was held invalid, the court saying: "Had the parties attempted to make an absolute sale of the property, described as in this case, and nothing further had been done thereunder, it is clear within previous decisions of this court such a sale could not be

sustained. I see no good reason for any distinction. It is true that a mortgage upon property is but a mere security for the debt, and that the title to the property remains in the mortgagor. After condition broken, however, when the parties are likely, if at all, to disagree, the mortgagee has the right to take possession and sell the property, so that what at first was a mere security has thus passed into an absolute sale."

THIRD PRELIMINARY PROPOSITION.

When an officer of the Federal court, in the discharge of his duty under process issued from that court, does an act out of which arises a question of law not then settled by the courts of the State, the Federal courts will decide the question according to their own view of the law, and unaffected by decisions of the State courts rendered after the act occurred.

AUTHORITIES.

Burgess v. Seligman, 107 U. S. 20.

Ober v. Gallagher, 3 Otto 199.

Anderson v. Santa Anna Township, 116 U. S. 356.

ARGUMENT.

If this court should be of the opinion that the case of Oxsheer v. Watt, 91 Tex. 124, referred to in the argument under the second proposition above, is an authority upon the questions involved in the case at bar, still this Court should not follow that decision because the levy of the execution involved herein was made on June 15, 1893, and the rights of the parties were then fixed and these suits were brought on June 29, 1893, four years before that decision was rendered in 1897. At the

time these transactions occurred what was the state of the law? The Supreme Court of Texas in Cleveland v. Williams and in Moss v. Sanger had held such sales invalid. Every text writer and reported case had held such a mortgage invalid against an execution creditor. No decision in Texas was to the contrary. Could the marshal have refused to levy the execution on the ground that at some future time the Supreme Court of Texas might declare the law differently? The Federal Court by its writ commanded the marshal to levy the writ according to the law as it existed in 1893. Will the Federal court now condemn him for levying it according to that law? If this Court thinks the levy was good according to the law in 1893, when the transactions took place and the rights of the parties were fixed, will it decide the case according to that law or will it refuse to exercise its own judgment on these transactions and condemn its officer for following the law at that time, because the State court has changed its mind on the question?

The decisions of this Court are clearly to the effect that transactions must be decided by this Court according to the law as it existed when they occurred. In Burgess v. Seligman, supra, this Court, among other things, says: "But the appellants' counsel, with much confidence, press upon our attention the decisions of the Supreme Court of Missouri on the questions involved in this case and on the very transactions we are considering. * * We do not consider ourselves bound to follow the decision of the State court in this case. When the transactions in controversy occurred and when the case was under consideration of the Circuit Court no construction of the statute had

been given by the state tribunals contrary to that given by the Circuit Court. * * So when contracts and transactions have been entered into and rights have accrued thereon under a particular state of the decisions or when there has been no decision of the state tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued."

So in Ober v. Gallagher, 3 Otto. 199, this Court held that an express vendor's lien on land passed to the assignee of the debt and refused to follow the decisions of the Supreme Court of Arkansas to the contrary rendered after such assignment was made. In that case this Court said: "Under these circumstances we are not satisfied that, when these notes were assigned, it was a settled rule of property in Arkansas that a lien for purchase money expressly reserved would not pass by an assignment of the debt."

In Anderson v. Santa Anna Township, 116 U. S. 356, this Court says: "While the courts of the United States accept and apply the construction of a State Constitution or of a local statute, upon which the rights of the parties depend, which has been fixed by the course of decisions of the State court, it is the settled doctrine of this Court, that rights accruing under one construction will not be lost merely by a change of opinion in the State court, and where such rights have accrued before the State court has announced its construction, the Federal courts, although leaning to an agreement with the State court, must determine the question upon their own independent judgment. If the decisions of the State court, commencing

with Howard v. St. Clair Drainage Co., would, if applied here, require an affirmance, we cannot depart from the long established doctrine, which makes it our duty to determine the rights of parties, according to that law as judically declared at the time such rights accrued, or, in the absence of any such declaration, according to the law as, in our judgment, it then was."

PROPOSITION UNDER FIRST AND SECOND ASSIGNMENTS OF ERROR.

The decision in the case at bar holding this mortgage valid against a levying execution creditor is wrong and opposed to every authority on the question, because the facts as stated in the opinion of the court below show that, "At the time the mortgage was executed to secure the note there were many more animals of the same description mingled with those upon which the mortgage was given. * * * But the animals covered by the mortgage were not separated from the others of the same description with which they were mingled, nor was there such separation when the execution in favor of Avery was levied upon the property in controversy" (Record, p. 64).

AUTHORITIES.

Northwestern National Bank v. Freeman, 171 U. S. 620.

Avery v. Popper, 34 Southwestern Rep. 325 (Texas).

Cleveland v. Williams, 29 Tex. 212.

Moss v. Sanger, 12 S. W. Rep. 616 (Texas).

Jones on Chattel Mortgages, Secs. 54, 55 and 56.

Cobbey on Chattel Mortgages, Vol. 1, Secs. 182 and 183.

Herman on Chattel Mortgages, Secs. 33 and 42.

Fowler v. Hunt, 48 Wis. 345.

Price v. McComas, 21 Neb. 195.

Newell v. Warner, 44 Barb. 263. (N. Y).

Bullock v. Williams, 16 Pick. 33. (Mass.)

Stonebroker v. Ford, 81 Mo. 532.

Parker v. Chase, 62 Vt. 206.

Sowder v. Vorhees, 36 Kas. 138.

Clark v. Vorhees, 36 Kas. 144.

Richardson v. Alpina Lumber Co., 40 Mich. 203.

Barrett v. Fisch, 76 Ia. 552.

Croswell v. Allis, 25 Conn. 301.

Tindall v. Wasson, 74 Ind. 499 and 500.

Gregory v. N. P. L. Co., 15 Ore. 447.

Taber v. Sampson, 7 Colo. 427.

Byrd v. Forbes, 13 Pac. Rep. 715 (Washington Territory).

Machine Co. v. Min., etc., Co. 61 N. W. Rep. 378 (Minn.)

Krone v. Phelps, 43 Ark. 350.

Suggs v. Tillman, 3 Swan. 208. (Tenn.)

Blakey v. Patrick, 67 N. C. 40.

Stewart v. Jaques, 77 Ga. 365.

Kelly v. Reid, 57 Miss. 89.

Jackson v. Christenson, 55 Pac. Rep. 562 (Utah).

ARGUMENT.

The inconsistent and unreasonable results reached by the judgment in this case shows the unsoundness of the opinion of the Supreme Court of Texas. That court decides: (1) That the defendants in error CAN select from the herd of similar cattle and recover the value of 50 cows, BE-

CAUSE NO PARTICULAR ANIMALS CAN BE IDENTIFIED.

(2) That defendants in error CANNOT select from the herd of similar cattle and recover the value of 50 calves, BECAUSE NO PARTICULAR ANIMALS CAN BE IDENTIFIED.

(3) That defendants in error CAN select from the herd of similar horses 3 colts, BECAUSE NO PARTICULAR ANIMALS CAN BE IDENTIFIED.

We know of no process of reasoning or principle of law by which these results can be reconciled. We submit that the only correct result should be this: That the defendants in error CANNOT recover against plaintiffs in error in this case AT ALL, BECAUSE NO PARTICULAR ANIMALS CAN BE IDENTIFIED. This result is supported by every text writer and every reported case on the subject as shown by the following quotations:

In Northwestern National Bank v. Freeman, supra, Justice McKenna says: "The rule is laid down that as to third persons who have acquired interests a description in a mortgage of a given number of articles out of a larger number is not sufficient."

In Avery v. Popper, supra, on the former appeal in the case at bar in 1894, the court says: "Under the evidence it appears that there were many more animals of the same description all mingled together and there had been no separation at the time they were taken in execution. This rendered the description wholly insufficient." This case has been cited and approved in Jackson v. Christenson, supra, and in Am. & Eng. Enc. Law (2nd Ed.). Vol. 5, p. 962.

Jones on Chattel Mortgages states the law thus, in sections 54, 55 and 56: Sec. 54: "A de-

scription may be sufficient between the immediate parties to the mortgage which would not be sufficient as against creditors of the mortgagor, or purchasers from him." Sec. 55: "A description which is sufficient between the parties may be insufficient as against third parties. In treating of the sufficiency of descriptions contained in mortgages, their sufficiency as against third parties is referred to unless their sufficiency as between the parties is expressly designated." Sec. 56: "A mortgage of a specified number of articles out of a larger number is void for uncertainty when the particular articles intended to be conveyed are not separated or designated in any way so that they can be separated from others of the same kind."

The above statement of the law is supported by sound reason and by every reported decision on the subject, including all those above cited.

The opinion in the case at bar fails to observe the above distinction, and holds that because this mortgage may be valid between the parties, it is therefore valid against levying creditors, purchasers and all third persons. As shown by the above cases, there are many good reasons why this distinction should be observed, and such mortgages be held invalid against creditors and purchasers. "To hide away his entire crops from his creditors, a party need only to give a chattel mortgage on a few bushels of the whole product, describing it so imperfectly that neither creditor nor officer could distinguish the mortgaged from the reserved." Clark v. Vorhees, 36 Kas. 144.

"The debtor may pass his claim from one part of the bulk to another under this undefined right until all is consumed." Sugg v. Tillman, 2 Swan. 208 (Tenn.)

"To sustain such mortgages would, I think, enable parties to commit gross fraud." Richardson v. Alpina Lumber Co., 40 Mich. 203.

"It has frequently been held by this Court that the record of a mortgage containing a description similar to that in question was not constructive notice to creditors, or subsequent purchaser of the rights of the mortgagee." Barrett v. Fisch, 76 Ia. 552.

"But if such property requires to be measured, weighed, counted off or otherwise separated from other and larger parcels or quantities, these are not to be considered as dispensed with by registration." Bullock v. Williams, 16 Pick. 33.

"The bank is found to be an innocent purchaser for value. By this is meant that it had no actual notice of the prior mortgages. Did the law impute notice to it? Certainly not by the record of the mortgage to appellee." Northwestern Nat. Bank v. Freeman, supra.

This opinion in the case at bar also ignores the distinction between this right of selection as between the mortgagor and mortgagee and such right after the interest of levying creditors or purchasers have attached, On the contrary it holds that the mortgagee has an unlimited right of selection, and after the property has been levied on and sold he can select the very articles sold and sue the officer or purchaser for them or their value. This is opposed to all the authorities and to sound reason. In Parker v. Chase, 62 Vt. 206, the court says: "It is suggested that such a mortgage is notice that a given number are incumbered and that the party may be called upon to complete the designation. A mortgage which leaves the designation of the specific property resting exclusvely

in the minds of the parties fails to meet the fundamental purposes and requirements of the law."

Fowler v. Hunt, 48 Wis. 345, holds: "The mortgage leaves a right of future selection of any of the property to the mortgagor to the value of $200.00, the residue of which can be ascertained only by such selection, and in either view such uncertainty of description renders the mortgage void."

Sowder v. Vorhees, 36 Kas. 138 holds: "How then was the corn to be designated? What portion of the tract was the mortgaged corn to be taken from? What quality was conveyed, the good, the inferior, or the very inferior? By whom was the selection or designation to be made? Counsel for plaintiff have not satisfactorily answered these questions."

In Richardson v. Alpina Lumber Co., 40 Mich. 207, the court says: "It will thus be seen that the question as to whether these mortgages are void for uncertainty or not does not arise between the mortgagor and the mortgagees. It is not the intention therefore to intimate what the rule would be in such cases. It is evident that after third parties have acquired rights in such a case very serious questions might arise in carrying out such a mortgage. If the mortgagee should attempt to take possession of the quantity described, would he have a right to assort and take such logs as he thought proper, or would the mortgagor be the person to make the selection, or both together? If the mortgagee was the proper person, would he not be most likely to pick out and take the most valuable? And if the mortgagor was the proper party to make the selection, he might take the other extreme, and point out those of least value. While, if both should act in concert and disputes arise

between them, which would have the right to control? Or if they did agree, might they not make a selection entirely different from the one contemplated at the time the mortgage was given, for the purpose of injuriously affecting the rights and interest which third parties had in the mean time acquired in the property? It is clear that if the parties interested are to make the selection, then the persons who have intermediate the date of the mortgage and the time of selection acquired interests, should be consulted and take part, and if a number of persons have thus acquired distinct and separate interests all would have to be called in and would have a right to participate in the selection etc. * * It seems to me that serious difficulties must inevitably arise in any aspect of the case in attempting to carry out such an agreement."

Under the doctrine of the case at bar, it would be impossible for a United States marshal to make a levy without subjecting him or the creditor in the execution to an action for damages. In Cornelius v. Burford, 28 Tex. 203, it is held that: "There is no doubt that an officer is liable in damages for making an excessive levy." Suppose that A. owns 1000 head of cattle, worth $10.00 per head, and that B. who lives in New York or London, holds a note on A. for $1,000.00 secured by a chattel mortgage decribing the security simply as 100 head out of this herd. Suppose that an execution against A. for $1,000.00 is placed in the hands of the marshal, what can he do? If he levies on the whole 1000 head he will be liable to the mortgagor for an excessive levy,as 100 head would be sufficient. If he seizes 100 head he will have no lien on the balance, and the mortgagor could sell

the balance. After a sale of the 100 head by the marshal, the morgagee could select these identical cattle and sue the marshal or the purchaser for them, or their value, under the doctrine of this case. If the marshal could levy on the whole herd the expense of holding the cattle and searching over America and England for the mortgagee would certainly hinder and delay, if not entirely defeat, the collection of the debt. The same thing would apply to a purchaser of any of the cattle. The mortgagor could dispose of the balance and the mortgagee could then select and sue for the ones sold. "If a mortgage with a description like this, that gives no clue by which parties may know what part is mortgaged and what reserved is to be upheld, then gross fraud can be easily committed" Clark v. Vorhees, 36 Kas. 144. "To sustain such mortgages would, I think, enable parties to commit gross frauds and would also tend to prevent the parties from afterwards purchasing or acquiring interest in the property, a part of which had been thus mortgaged, and thus tend to discourage trade." Richardson v. Alpina Lumber Co., 40 Mich. 203.

PROPOSITION UNDER THIRD ASSIGNMENT OF ERROR.

The judgment in the case at bar is clearly wrong to the extent of $200.00, the value of the mare, horse and mule colt.

STATEMENT.

The trial court rendered judgment against plaintiffs in error for $850.00 (Record p. 13). The Supreme Court states in its opinion that this was: "the value of fifty cows, one bay mare colt, one bay horse colt and one black mare colt" (Record p. 63).

The Supreme Court then finds the value of the fifty cows to be $13.00 per head, making $650.00 (Record p. 64). It then holds that defendants in error cannot recover the value of the calves, and then renders the same judgment as the trial court, for $850.00, against the plaintiffs in error. The difference of $200.00 is the value of the three colts (Record p. 67). If defendants in error were not entitled to recover the value of the three colts the judgment is clearly wrong to the extent of $200.00 at least.

The mortgage attempts to cover fifty cows, branded Cook OK, with spring calves following the cows, and five mares branded J6, with spring colts following the mares, all in a pasture, etc. (Record pp. 25 and 26). J. H. Cooke testified that at the time this attempted mortgage was given there were "in the pasture about 100 head of cows, with calves following them, marked and branded the same as those in the chattel mortgage, and had there some ten or twelve mares, branded J6, with colts following them, in that pasture" (Record p. 25). He testified to the same thing on pages 36, 40 and 43 of the Record, and this evidence is undisputed. The Supreme Court finds as a fact that "At the time the mortgage was executed to secure the note there were many more animals of the same description mingled with those upon which the mortgage was given * * *, but the animals covered by the mortgage were not separated from the others of the same description with which they were mingled, nor was there such separation when the execution in favor of Avery was levied upon the property in controversy" (Record p. 64).

ARGUMENT.

From the foregoing statement it appears that the facts in regard to these colts are identically the same as those with reference to the calves. It would seem, therefore, that the same conclusion should be reached as to both. In its opinion the Supreme Court uses this language: "As we have seen, no right attached under the mortgage to specific animals, nor did it give a lien upon an undivided interest in the herd. * * * If the right (of selection) had been exercised while the calves of the spring of 1891 were following their mothers, the selection of the cow would have identified the calf. But having failed to exercise the right until in the course of nature the dam and the young would separate, it has become impossible to identify the calves, and all claim upon them has failed, before Avery converted the stock" (Record p. 66). The court therefore denied a recovery for the calves. By substituting the words "colts" for "calves" the above reasoning would apply exactly to the colts, for which recovery was allowed. The Supreme Court gives no reason for this distinction, and we cannot imagine any.

We also submit that this reasoning would equally apply to the cows. If, as held by the court, "no right attached under the mortgage to specific animals, nor did it give a lien upon an undivided interest in the herd," it would seem to clearly follow that "it has become impossible to identify the 'cows', and all claim upon them failed before Avery converted the stock."

It may be that allowing a recovery for the value of these colts was an oversight by the Supreme Court of Texas. But plaintiffs in error distinctly called this matter to the court's attention

both in their assignments of error (Record p. 48) and in their motion for rehearing before that court (Record p. 80).

PROPOSITION UNDER FOURTH ASSIGNMENT OF ERROR.

The undisputed evidence and the facts showed, as a matter of law, that the mortgage sued on in connection with the acts of the mortgagor and mortgagee, was fraudulent and void in law as against the creditors of the mortgagor and those claiming under such creditors.

STATEMENT.

The mortgage sued on was given May, 1891, to secure a note of even date in favor of T. H. King. After its maturity it was assigned by him to defendants in error (Record p. 2). W. W. Avery, under whom plaintiffs in error claimed, recovered his judgment against J. H. Cooke June 10, 1889, and an execution on this judgment was levied on this property in June, 1893 (Record pp. 33 and 34). In November, 1889, the mortgagor, J. H. Cooke, failed and made a deed of trust, covering all his property, to C. J. Steger (Record p. 28). R. R. Neyland, one of the defendants in error, obtained the mortgage sued on, and he testified as follows: "I think that since that Steger deed of trust in November, 1889, Mr. Cooke has been insolvent" (Record p. 31). J. H. Cooke, the mortgagor, testified as follows: "In 1892 I sold eight or ten head of horses and mules included in this chattel mortgage sued on and received about $800.00 for them. At that time T. H. King held the note sued on, and this sale was made with his consent. I paid him over about $600.00 of the money, telling him that it was part of the proceeds of the sale of

this stock, and with his consent I kept $200.00 of the money and used it in my business" (Record p. 21). All the foregoing facts are undisputed, and they were pleaded and insisted upon in the courts below (Record pp. 9, 50 and 80).

AUTHORITIES.

Freeman on Executions (2d ed.), sec. 145.
Andrews v. Dunn, 39 S. W. Rep. 209 (Texas).
Brown v. Barber, 47 Kan. 527.
Hangen v. Hochmeister, 114 N. Y. 566.
Goddard v. Jones, 78 Mo. 518.
News v. Sailors, 114 Ind. 407.
Fisk v. Harshaw, 45 Wis. 668.

ARGUMENT.

Freeman on Executions, supra, says: "If the mortgagor is, by agreement of the parties, permitted to retain any portion of the proceeds of sale made by him, either for his own use or for the support of himself or family or any member thereof, the mortgage is doubtless fraudulent, and void AS A MATTER OF LAW."

In Andrews v. Dunn, supra, the court holds: "He (the mortgagee) cannot manage his mortgage lien so as to enable the debtor to appropriate the property or a portion of it, while he holds off other creditors by the assertion of his mortgage lien against them." The other cases cited above are to the some effect and fully sustain the above proposition. We therefore submit that the mortgage sued on is fraudulent and void as against plaintiffs in error.

PROPOSITION UNDER FIFTH ASSIGNMENT OF ERROR.

Where the State court applies a measure of damages, for acts of a United States marshal act-

ing under an execution from the Federal court, different from the measure applied for similar acts of a State sheriff acting under an execution from the State court, the judgment of the State court must be reversed.

STATEMENT.

The plaintiffs in error were not parties to or liable on the note and mortgage sued on. Their liability is claimed on the ground that the property was levied upon and sold by the United States marshal and converted. This levy, sale and conversion, if any, took place in June, 1893 (Record p. 34). The trial of this case in the trial court occurred in November, 1897, more than four years thereafter (Record p. 13). The Court of Civil Appeals made the following findings of facts, viz.: "The finding of the trial court, which is sustained by the evidence, as to the value of the property in controversy, is as follows: Cows $13.00 per head," &c. (Record p. 57). "The evidence is sufficient to show the value of the property at the time of the trial, was as found by the trial court, and the value so found relates to that time and not to the time the property was levied upon by the United States marshal, or when the writs of sequestration were issued" (Record p. 59). Under the laws of Texas these findings of fact are binding on the Supreme Court of Texas, and that court adopted the value as found by the trial court and Court of Civil Appeals and rendered judgment for the value of the animals at the time of the trial in November, 1897. (Record pp. 64, 67 and 77).

AUTHORITIES.

Revised Statutes of the United States, Secs. 788 and 916.

Jones on Chattel Mortgages, Sec. 448.

Tucker v. Hamlin, 60 Tex. 174.

Block v. Sweeny, 63 Tex. 426.

Gilmore v. Heintz, 85 Tex. 79.

McLeod, &c., v. Craig, 43 Southwestern Reporter, 934 (Texas).

ARGUMENT.

Under the above sections of the Revised Statutes of the United States it seems clear that the same measure or rule of damages must be applied for a levy, sale and conversion growing out of the acts of a United States marshal acting under Federal process as would be applied under similar circumstances to similar acts of a State sheriff under State process. It is also evident that the judgment against plaintiffs in error is based on a conversion growing out of such levy and sale by a United States marshal. In its opinion the Supreme Court of Texas says: "All of said property was, on June 28, 1893, by virtue of said execution, sold by the United States marshal in Hunt county, Texas, at public outcry and was bid in by J. M. Avery in the name of W. W. Avery, and all the property was delivered by the marshal to J. M. Avery, the attorney for W. W. Avery" (Record p. 63). "After J. M. Avery replevied the property he drove it out of Hunt county, Texas, and within a short time thereafter sold and disposed of all of it. He had none of said property on hand when this suit was tried in the court below" (Record p. 64). "Avery got possession of the property and converted it to his own use. He was liable for its value" (Record

p. 67). From the above statement it is also clear that the judgment is for the value of the animals at the time of the trial in November, 1897, and not their value at the time of the alleged levy, sale and conversion in June, 1893. The only question therefore is: Did the State court assess their value at a different date and apply a different measure of damages from that applicable to other similar cases under State process?

The usual rule applicable to such cases is thus stated by Jones on Chattel Mortgages, Sec. 448: "The damages which a mortgagee is entitled to recover is the value of the property AT THE TIME OF THE CONVERSION." We submit that the only reasonable and sensible rule in such cases is the value of the animals at the time of the conversion, and legal interest thereon since that date. This fully compensates plaintiff. for his damages and any other measure is mere guesswork. A witness familiar with such matters can reasonably and properly swear to the value of animals when he last saw them and while they are alive, but he can only guess at what they would be worth five years after they have died.

This is illustrated by the testimony admitted in this case. The witness, Teague, testified that at the time of the levy and conversion in June, 1893, these cows were worth $10.00 per head, and as to their value on the day of the trial, in November, 1897, he testified: "Those cattle to-day MIGHT be worth 25 per cent more than they were at that time" (Record p. 42). The witness, Humphreys, testified to the same value in 1893, and then said: "I EXPECT that those cattle to-day would be worth 25 per cent more than they were in June, 1893" (Record p. 44). The witness, McUlmurray, testi-

fied in the same uncertain way as to the increase in value of the horses and mule (Record p. 45). The plaintiffs in error objected to all testimony as to their value at the time of the trial in 1897, but their objections were overruled, and they excepted. (Record pp. 42, 44 and 45). The trial court and appellate courts based their findings on this guesswork and found the value to be $13.00 per head, about 25 per cent more than they were worth in 1893.

It is well known that cattle and horses, like other personal property, fluctuate in value. Cattle are now worth about twice as much as in 1893.

If the case was tried now, under the rule in this case, the witnesses would guess that the cattle, though dead, were worth twice as much as in 1893, and the judge would guess that the plaintiffs in error were liable for $1700 instead of $850, as in 1897. Under this rule the rights of parties are not certain, but depend on what day the case happens to be tried.

We also submit that in similar actions growing out of the acts of State officers, the rule is well settled in Texas that the measure of damages is the value of the property at the time and place of seizure and conversion and interest thereon. Tucker v. Hamlin, 60 Tex. 174, was an action against the sheriff and attaching creditors for unlawful seizure and sale of certain articles under a writ of attachment, and the court says: "The measure of such damages has been well settled by the decisions of this court to be the value of the goods seized at the place of the seizure ON THE DAY of conversion and interest on that value."

Block v. Sweeney, 63 Tex. 426, was a similar

action, and the court says: "Interest, in addition to the market value at the TIME and place of seizure, is the compensation to which a person in an action of this kind is entitled. If, between the time of seizure and sale the property depreciates in value, that cannot affect the right of the person whose property has been illegally converted; if it increased in value that fact cannot affect the amount of the recovery."

In McLeod, &c., Co. v. Craig, supra, the Court of Civil Appeals of Texas, as correctly shown by the head notes, held as follows: "Where, in a suit for the enforcement of a mortgage, the property is sequestered and defendant replevies it, the measure of liability on the bond is the value of the property at the date of the approval of the bond, with legal interest." The Supreme Court of Texas refused a writ of error in that case and approved this holding.

We therefore submit that in the case at bar the courts below applied a different rule of damages to the acts of the United States marshal from the well settled rule applied to similar acts of a State officer under similar circumstances; which was contrary to the laws of the United States.

CROSS ASSIGNMENTS OF ERROR BY APPELLEES.

We notice that there is included in the printed record a paper called "cross assignments of error by appellees" (Record p. 92). This is not found in the written record sent up by the clerk of the Supreme Court of Texas and certified by him to contain all the record and proceedings in the State Supreme Court (Record p. 90) It is headed "In the Court of Civil Appeals, Fifth Supreme Judicial District of Texas" (Record p. 92). In

pursuance of rule 10, section 9, of this court by stipulation of the parties, only certain parts of the written record necessary for the decision in this court were to be printed, and it was agreed that this paper might be printed for what it was worth (Record pp. 91–92). The written record was filed in this Court May 24, 1899, and this stipulation containing this paper was filed Aug. 24, 1899 (Record p. 96). The defendants in error never sued out any writ of error from this Court and have never filed in this Court any assignment of error complaining of the action of the Supreme Court of Texas. This paper complains of certain errors alleged to have been committed by the trial court.

We do not know whether the defendants in error will attempt to urge this matter or not. But in regard to this paper and this matter we submit the following:

FIRST.

This paper cannot be considered a part of the record in this Court, and even if it could be thus considered, it cannot take the place of the assignment of error required to be filed by Section 997 of the United States Revised Statutes.

AUTHORITIES.

Benites v. Hampton, 123 U. S. 519.

In above case the Court says: "The assignment of errors on the appeal from the District Court to the Supreme Court of the Territory can not be accepted in this Court as the equivalent of the assignment required by the Statute."

SECOND.

The defendants in error have not taken out a writ of error in this case and cannot assign errors or complain of any ruling or judgment adverse to them in the courts below.

AUTHORITIES.

Bolles v. Outing Co., decided by U. S. Supreme Court December 4, 1899, and cases therein cited.

In disposing of similar matters in the above case, Mr. Justice Brown, for this Court, says: "It is sufficient to say of these that defendant did not take out a writ of error and cannot now be heard to complain of any adverse rulings in the court below."

We therefore submit that this paper and the questions attempted to be raised in it cannot be considered by this Court. But if they are considered, the questions presented are fully met and discussed in our presentation of our first and second assignments of error in this brief, and need not be again repeated.

CONCLUSION.

We respectfully submit: (1), that the mortgage sued on was invalid as against the judgment and execution from the United States Circuit Court, and the levy and sale by the United States marshal, and the title of plaintiffs in error acquired thereby was superior to the rights of defendants in error; (2), that the judgment below was erroneous at least to the extent of $200.00, the value of the three colts; (3), that the mortgage

sued on, in connection with the acts of the mortgagor and morgagee, is fraudulent and void as against the title of plaintiffs in error acquired through the above judgment and execution from the United States Circuit Court and the levy and sale by the United States marshal; and (4), that by the judgment below a different and greater measure of damages is applied to a sale by a United States marshal from that applied to similar acts by State officers, contrary to the laws of the United States.

All of the matters presented in this brief have been specially set up and insisted upon throughout this litigation by plaintiffs in error and the decision and judgment below is against their title and claims under the laws and authority of the United States and its courts and officers. We therefore pray that the judgment below be reversed and the cause remanded.

JOHN M. AVERY,

Attorney for Plaintiffs in Error, J. M. Avery, C. C. Cobb and H. I. Phillips.

No. 312. 72

By Looney for 2068

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Clerk.

Filed April 12, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 312. 72

JOHN M. AVERY, CHARLES C. COBB, AND H. I. PHILLIPS, PLAINTIFFS IN ERROR,

vs.

I. POPPER & BRO. AND R. R. NEYLAND ET AL.

BRIEF FOR DEFENDANTS IN ERROR.

BENJAMIN F. LOONEY,
Attorney for Defendants in Error,
I. Popper & Bro. and R. R. Neyland.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 4-12-1900

IN THE

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vs.

I. POPPER & BRO. AND R. R. NEYLAND ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

BRIEF FOR DEFENDANTS IN ERROR.

ABSTRACT OR STATEMENT OF THE CASE.

The defendants in error respectfully beg leave to present the following as a correct abstract or statement of the case, presenting the questions involved and the manner in which they arose:

On June 29, 1893, I. Popper & Bro. brought a suit in the district court of Hunt county, Texas, against J. H. and M. E. Cooke, W. W. Avery, and John M. Avery to recover of J. H.

and M. E. Cooke the sum of $775, with interest, upon the note hereinafter described, and to foreclose as against all the defendants a mortgage lien on the property hereinafter described. On the same day R. R. Neyland & Co., a firm composed of R. R. Neyland, brought a separate suit against the same parties to recover the balance due on said note, after deducting the amount for which I. Popper & Bro. sued, and likewise to foreclose said mortgage.

In each suit a writ of sequestration was sued out under the statute of Texas against W. W. and J. M. Avery, the property then being in the possession of J. M. Avery, and after its seizure by the sheriff of Hunt county under the writs of sequestration, was replevied by J. M. Avery, he giving sureties upon his replevy bond the defendants in error Charles C. Cobb and H. I. Phillips.

On the 16th day of January, 1894, motions were made in each case by the defendant John M. Avery to quash the sequestration proceedings. These motions were overruled, and on the same day, on application of the plaintiffs, the defendants in error herein, the two cases were consolidated. None of the defendants except J. M. Avery filed answers. After the cases were consolidated the plaintiffs filed an amended petition, in which, in addition to the matters plead in their several petitions in the original suits, they alleged the issuance and levy of the writs of sequestration, the replevy of the property by J. M. Avery, and that afterwards Avery had moved the property out of Hunt county and converted it to his own use; that they claimed a mortgage lien upon the property in controversy, and in case the court should hold that the mortgage did not cover any specific stock, they claim the right to elect, and did elect, to claim the property involved herein. In the amended pleadings after the consolidation, W. W. Avery was not continued as a party to the suit.

The defendant J. M. Avery, in his answer to the merits, alleged the purchase of the property under an execution

issued from the circuit court of the United States at Dallas by virtue of a judgment there rendered in favor of W. W. Avery against J. H. Cooke and other parties not necessary here to be mentioned. He claimed further that the mortgage sought to be foreclosed was void for want of sufficient description of the property, in that at the time it was given J. H. and M. E. Cooke had a great many more similar stock which were kept mingled with the stock mortgaged. He further claimed that the mortgage covered a great many more stock and horses besides those seized and purchased by him under execution and sequestered in the consolidation suits; and he prayed that the mortgage be foreclosed on all the stock, and that the other stock be sold first. In other words, he invoked the doctrine of the marshaling of assets. He also plead that the mortgage was fraudulent and void because at the time it was given J. H. Cooke was insolvent and had ever since remained so, and it was with the knowledge and consent of the mortgagee and plaintiffs that Cooke had sold some of the mortgaged property and appropriated the proceeds to his own use.

In a supplemental petition the plaintiffs alleged that the property mortgaged to secure the note was the separate property of Mrs. M. E. Cooke, the wife of J. H. Cooke, and that the plaintiffs in error had no right to invoke the doctrine of the marshaling of assets. The plaintiffs in error have stated the character and amount of judgment rendered in the respective courts, which I will not repeat.

On an appeal by the plaintiffs in error from the judgment of the district court of Hunt county, the defendants in error herein, under the rules promulgated by the supreme court of Texas, filed cross-assignments of error, all of which were sustained except the fourth, which will hereafter be treated in this brief.

Under the laws of Texas the findings of fact made by the court of civil appeals are conclusive. I therefore give

below their findings in full as a part of the statement of this case.

The Findings of Fact Made by the Honorable Court of Civil Appeals in this Case.

On May 26, 1891, J. H. Cooke and his wife, M. E. Cooke, executed and delivered to T. H. King their joint and several promissory note for $1,940, payable on the 1st day of November thereafter, with interest from January 1, 1891, at the rate of 12 per cent. per annum. The note provided for 10 per cent. attorney's fees, if placed in the hands of an attorney for collection.

On the 10th day of April, 1892, the payee, T. H. King, transferred without recourse to I. Popper & Bro. an interest of $775 in said note, with interest thereon at the rate expressed in the note from its date. At the same time said payee transferred without recourse the balance of said note, principal and interest, to R. R. Neyland, under the firm name of R. R. Neyland & Co.

To secure the payment of said note, the makers thereof, on May 26, 1891, executed and delivered to T. H. King their chattel mortgage, whereby they conveyed to him, among other property, 50 cows, with their spring calves (spring of 1891); cows branded Cooke on the left side and O. K. on left hip, and the calves at the time were not branded (but the mortgage provided that they should be branded in the same brands as the cows); also one bay mare colt, one bay horse colt, and one black mule colt. This instrument was filed and duly registered as a chattel mortgage in the chattel-mortgage register of Hunt county, Texas, in which the mortgagors reside and the property was situated, on May 30, 1891.

On June 14, 1893, the United States marshal, by virtue of an execution issued on June 9, 1893, out of the United States circuit court at Dallas on a judgment therein rendered in

favor of W. W. Avery and against J. H. Cooke and sureties on his sequestration bond, but not against his wife, said sureties being O. Hail, William Hodges, and J. M. Johnston, levied upon the property above described.

The levy was made in Hunt county by direction of J. M. Avery, the attorney of W. W. Avery. All of said property was on June 28, 1893, by virtue of said execution sold by the United States marshal in Hunt county, Texas, at public outcry, and was bid in by J. M. Avery in the name of W. W. Avery, the amount of the bid being credited upon the execution, and all of the property was then delivered by the marshal to J. M. Avery, the attorney of W. W. Avery.

On June 29, 1893, I. Popper & Bro. and R. R. Neyland & Co. filed separate suits against J. H. and M. E. Cooke and W. W. and J. M. Avery to recover of the makers of the note above described the amount respectively due them by reason of the transfer of said note by the payee, and to foreclose the mortgage given to secure the note upon the property above described. The property was then seized while in possession of J. M. Avery by virtue of writs of sequestration issued in these suits. After such seizure J. M. Avery replevied and resumed possession of the property, Charles C. Cobb and H. I. Phillips being the sureties on his replevy bond.

After J. M. Avery replevied the property he drove it out of Hunt county, Texas, and within a short time thereafter sold and disposed of all of it. He had none of said property on hand when this suit was tried in the court below, and would have been wholly unable to produce said property or any part thereof in satisfaction or partial satisfaction of the judgment rendered in said court.

At the time the mortgage was executed to secure the note there were many more animals of the same description mingled with those upon which the mortgage was given, but the evidence is sufficient to show that just prior to the execution of the mortgage the animals embraced in it were

pointed out to Mr. Neyland, who represented King in taking the mortgage security and drafting the mortgage. But the animals covered in the mortgage were not separated from the others of the same description with which they were mingled; nor was there such separation when the execution in favor of Avery was levied upon the property in controversy.

The evidence is reasonably sufficient to show that the 50 head of cows described in the mortgage, as well as all others of like description mingled with them, were the separate property of Mrs. M. E. Cooke at the time the mortgage was executed and continued to be her separate property until disposed of by Mr. Avery. The 50 calves were calved during the marriage of J. H. Cooke and wife, after the cows became the separate property of Mrs. M. E. Cooke, and were therefore, when the mortgage was given and the execution in favor of Avery levied, the community property of J. H. and M. E. Cooke. The horses and mules involved in this suit were the offspring of the separate property of M. E. Cooke during her marriage with J. H. Cooke, and were likewise the community property of J. H. Cooke and wife at the time the mortgage was given and the writ of execution in favor of Avery levied upon the same.

From the view we take of the case, which will be shown in our conclusions of law, we do not deem it necessary to pass upon the question as to whether or not the deed of trust made on the 15th day of November, 1889, by J. H. Cooke to J. E. Steger, through which Mrs. M. E. Cooke claims the property mortgaged to secure the debt sued on, was fraudulent. But if we deemed the question essential to a proper disposition of this case, we should find that the testimony is reasonably sufficient to show that such deed of trust was made by J. H. Cooke for the purpose of securing his creditors, among whom was his wife, M. E. Cooke, and that the value of the property did not exceed the indebtedness it was transferred to secure.

The finding of the trial court, which is sustained by the

evidence, as to the value of the property in controversy is as follows: Cows, $13 per head; horses, $50 per head; mules, $75 per head; seventeen two-year-old past steers, $12 per head, and thirty-three two-year-old past heifers, $10 per head, aggregating $1,384. Excluding the property sequestered, upon which the mortgage is sought to be foreclosed, the remainder of the property covered by the King mortgage was, in June or July, 1893, worth $700. Since that time some of the stock not sequestered have died and some strayed, so that those left on hand when the suit was tried in the court below did not exceed in value the sum of $200. When the suits, which were consolidated, were instituted the appellant J. M. Avery resided in Dallas county and has since resided in that county continuously ever since that time. The evidence is not sufficient to show that the mortgage given to secure the note sued on was fraudulent, or that the property exceeded in value the debt it was mortgaged to secure.

The pleadings of the parties are shown on pages 1 to 11, inclusive, of the record. The conclusions of fact made by the court of civil appeals are found on pages 55 to 57 of the record.

The defendants in error submit the following counter-proposition in answer to "first preliminary proposition" of plaintiffs in error.

There is no question raised in this case for the jurisdiction of this court, as the final judgment of the supreme court of the State of Texas did not draw in question the validity of a statute of or an authority exercised under the United States, and there was no decision by said court against any title, right, privilege, or immunity set up or claimed by plaintiffs in error under any statute or authority under the United States.

AUTHORITIES.

Day *vs.* Gallup, 69th U. S., 279.
Buck *vs.* Colbath, 70th U. S., 334; 129th U. S., 506.

ARGUMENT.

We submit that the cases cited by plaintiffs in error to sustain the jurisdiction of this court fall short of accomplishing that purpose. The case of Clement *vs.* Berry, 11th Howard, 412, was where the marshal of the United States district court for middle Tennessee was sued in the circuit court of the State in replevin to recover property levied upon, and the sale was stopped by injunction issued from the State court. In that case the officer was a party defendant to the suit, and justified under the writ issued from the Federal court.

In the case of Buck *vs.* Colbath, 70th U. S., 334, Buck, as United States marshal for the district of Minnesota, levied a writ of attachment upon certain goods claimed by Colbath, who sued the marshal in trespass for their value. This court held that it had jurisdiction under the twenty-fifth section of the judiciary act, the defendant claiming the protection of an authority exercised under the United States, and the decision of the State court was against the protection thus claimed, or, in other words, against the validity of that authority as a protection to him in that action. The court will observe, however, that in that opinion the doctrine contended for by the defendants in error herein is reaffirmed. The court says:

"It is only while the property is in the possession of the court, either actually or constructively, that the court is bound to protect that possession from the process of other courts. Whenever the litigation is ended, or the possession of the officer or court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not. The effect to be given in such cases to the adjudications of the court first possessed of the property depends upon principles familiar to the law, but no contest arises about the mere possession, and no conflict but such as may be decided without unseemly and

discreditable collisions. It is upon this ground that the court in Day *vs.* Gallup held that this court had no jurisdiction of that case. The property attached had been sold and the attachment suit ended when the attaching officer and his assistants were sued, and we held that such a suit in the State court commenced after the proceedings in the Federal court had been concluded, raised no question for the jurisdiction of this court."

The case of Stanley *vs.* Schwalby, 162 U. S., 255, was where defendant in error brought an action of trespass to try title under Texas statutes for land claimed by the United States and occupied by officers of the United States Army, and on question of jurisdiction this court said:

"The decision of the court of civil appeals that the United States had notice of the deed of McMillan, and therefore had no title in the land, and judgment should be rendered against their officers for both title and possession, was a decision in matter of law against the validity of the authority set up by those officers under the United States, and as such was reviewable by this court, and being erroneous, must be reversed."

The case of Etherridge *vs.* Sperry, 139 U. S., 266, was where plaintiff in error, a deputy United States marshal of Iowa, levied a writ of attachment on property upon which the defendants in error held a mortgage, and after the property was sold the officer was sued in State court for its value. The court held that it had jurisdiction in this case, citing Buck *vs.* Colbath, above referred to, as authority.

In the case of Pittsburg, &c., Railroad *vs.* Long Island, &c., Co., 172 U. S., 493, jurisdiction of this court was sustained because it was claimed that the State court of Ohio refused to give effect to the judgment of a court of the United States rendered upon the point in dispute, having jurisdiction of the subject-matter and of the parties. The right or title there claimed was under an authority exercised under the

United States, and the decision of the State court was against the title or right so set up.

In Colliers *vs.* Stanborough, 6th Howard, 20 and 21, jurisdiction of this court was maintained on the ground of an authority exercised under the United States, which the judgment of the State court drew in question, and decided against its validity. This court said:

"The supreme court of Louisiana declared in its opinion found in the record, and preceding the judgment, that a creditor residing in another State cannot issue an execution upon the judgment which he has obtained in the Federal court against the executor or administrator of an estate which is admitted in the probate court as insolvent and take the property out of the hands of such executor or administrator and leave nothing for the creditors."

In Bock *vs.* Perkins, 139 U. S., 628, a marshal and his deputies were sued in the State court in trespass for levying writs of attachment sued out in Federal court. This court, following its former decisions, maintained its jurisdiction on the ground that the marshal, being sued in trespass in a State court for taking property under a writ of attachment to him directed, defends upon the ground that the property attached belonged to the defendant therein named, and presents a case arising under the laws of the United States. It will thus be seen that in these cases the officers levying the writs were parties defendant, and justified or defended under the authority of the process, or that they were cases in which the validity or legal effect of the judgments of the United States courts were called in question and denied by the State court.

The case of Hurst *vs.* Cobb and Avery, 61st Fed. Rep., 1, will hardly be considered of controlling effect in this court, especially as it seems to ignore the doctrine heretofore announced in Day *vs.* Gallup, Buck *vs.* Colbath, and 129 U. S., 506.

I respectfully submit that the doctrine announced by this

court in the case of Day *vs.* Gallup, 69 U. S., 279, is decisive of the correctness of my proposition, and that no question arises in this case for the jurisdiction of this court. Derby and Day sued Griggs in the Federal court and had the marshal to levy upon a stock of goods formerly owned by Griggs, but transferred by him to one Gallup. Plaintiffs obtained judgment against Griggs and had the property sold in satisfaction of their judgment. After this Gallup sued Derby and Day and the marshal in action of trespass for the value of the property levied upon. The suit was dismissed as to the marshal, and on trial plaintiff obtained judgment against Derby and Day for the value of property levied upon by the officer. This judgment was affirmed by the supreme court of Minnesota, and the case came to this court on writ of error. On motion to dismiss for want of jurisdiction the court held as follows:

"In no part of the record does it appear that the authority of Gere, the marshal, to take the goods was drawn in question; nor is it to be inferred from any pleading by the defendant. The facts are that from the return of the execution satisfied the Federal court had no control over the parties. The case between the plaintiffs in error against Griggs had been decided, the money made on execution, and the debt paid."

The court held that under the provisions of the act of September 24, 1789, chap. 20, it had no jurisdiction of the case.

The case reported in the 129 U. S., 506, was where an assignee in bankruptcy by virtue of his title to property as such sued to recover property alleged by him to have been transferred by the bankrupt in fraud of his creditors. The assignee gained the suit in the State courts of Tennessee, and it was brought to this court on writ of error. The court held that no question was raised in the State court as to the power of the assignee under the acts of Congress on the rights vested in him as assignee. That the proceedings were

governed and the judgment of the court upon the validity of the conveyances were subject to review in the same manner and to the same extent as proceedings of a similar character by a creditor to set aside conveyances in fraud of his rights by a debtor. In the proceedings in the State court no question arose under the action of the State court which could bring its decision within the provisions of section 709 of the Revised Statutes.

Counter-proposition in Answer to Plaintiffs in Error's "Second and Third Preliminary Propositions."

It is a sufficient answer to the propositions second and third, made by plaintiffs in error, to state that the supreme court of Texas had in former cases definitely settled the right of a mortgagee to select or elect when his lien was upon a certain number of a greater quantity or number, and this certainly would be the case as between the parties and those claiming as purchasers in execution, as in this case.

AUTHORITIES.

23 Texas, 46.
77 Texas, 468.
91 Texas, 124.

The court said in case reported in the 23 Texas that—

"A grant by the owner of a certain number of acres in a particular tract would confer a right of election upon the grantee, and authorizes him to locate the quantity in any part of the tract he saw proper to elect upon the principle that a convention must be held to pass some interest, if such effect may be given to it consistently with the rules of law, and that if it is uncertain and ambiguous, it must be construed more strongly against the grantor."

Case in 77 Texas, 468, the supreme court said:

"It does not follow that because the deed of trust fails to convey any specific cattle that no rights were acquired

under it. Conceding that the herd contained a greater number of each description of cattle than was conveyed it does not follow that the contract was a nullity and conveyed no right to the vendees.

"As between the vendor and vendees it was proper for the contract to be subsequently executed by the selection and designation of sixty-five head of cattle."

It is conceded by the plaintiffs in error that the case of Oxsheer *vs.* Watt, 91 Texas, 124, decided in favor of the right of the mortgagee to elect and select the number mentioned in the mortgage from a greater number with which they were mingled.

Counter-proposition under First and Second Assignments of Error.

Should this court, however, hold that a question is presented for its jurisdiction, then I submit the following counter-proposition in answer to the propositions of law urged by the plaintiffs in error under their first and second assignments of error:

The decision of the supreme court of Texas holding the mortgage lien of the defendants in error superior to the rights of plaintiff in error, under the levy and sale of the property under execution, was correct for the following reasons:

A. Because the mortgagees had the right of election or selection from the herd of the number and kind covered by their mortgage.

AUTHORITIES.

23 Texas, 46.
77 Texas, 467.
91 Texas, 121.
Heywood's case, 2 Coke, 37.
Palmer's case, 5 Coke, 24.
Call *vs.* Gray, 37 N. H., 428.
Leighton *vs.* Brown, 19 Neb., 546.
Frost *vs.* Bank, 68 Wis., 234.

B. Because, the mortgage in question being valid and binding as between the original parties, it was also valid and binding as between defendants in error and plaintiffs in error, for the reason, if for no other, that a creditor purchasing property and crediting the amount of his bid on the execution is not an innocent purchaser for value.

AUTHORITIES.

87 Texas, 443.
61 Texas, 648.
67 Texas, 661.
69 Texas, 687.
32 S. W. R., 78.
29 S. W. R., 380.

C. Because the rights obtained by plaintiffs in error by virtue of the levy and sale of the cattle and horses as the property of J. H. Cooke are subordinate to the mortgage lien of the defendants in error.

AUTHORITIES.

Sales' Texas Civil Statutes provides as follows, to wit:

"Goods and chattels pledged, assigned or mortgaged as security for any debt or contract may be levied upon and sold on execution against the person making the pledge, assignment or mortgage, subject thereto, and the purchaser shall be entitled to possession when it is held by the pledgee, assignee or mortgagee on complying with the conditions of the pledge, assignment or mortgage."

D. Because the cows levied upon and sold were the separate property of the wife of J. H. Cooke, against whom the execution did not run. The plaintiffs in error therefore cannot, as to her property, urge the invalidity of the mortgage or ask that assets be marshalled.

AUTHORITIES.

1st edition, Am. and Eng. Enc. of Law, vol. 14, p. 699, and note 1.

E. Because this court will respect the law of the State of Texas as decisive in respect to any case arising with reference to chattel mortgages, as those questions are not of general commercial law, and each State has the right to determine for itself under what circumstances they may be executed, the extent of the rights conferred thereby, and the conditions of their validity.

AUTHORITIES.

139 U. S., 266.

Counter-proposition.

I submit that the answer made to the second and third assignments of error and propositions thereunder is sufficient to dispose of assignment of error No. 3.

Counter-proposition under Fourth Assignment.

I respectfully submit that the evidence was amply sufficient to warrant the finding by the district court and the court of civil appeals that no fraud in fact existed, and it fully warranted the supreme court in failing to find fraud in law.

Counter-proposition under Fifth Assignment.

The measure of damages applied by the State courts in this case is the measure contended for by the plaintiffs in error on their appeal below, and is the correct measure in all cases where personal property is levied upon under sequestration process and replevied by defendant in the writ.

AUTHORITIES.

Article 4864, Sales' Texas Civil Statutes, provides:

"Judges and clerks of the district and county courts, and justices of the peace shall at the commencement or during the progress of any civil suit before final judgment have power to issue writs of sequestration returnable to their respective courts in the following cases. * * * 3. Where a person sues for the foreclosure of a mortgage, or the enforcement of a lien upon personal property of any description and makes oath," &c.

Article 4873 provides that—

"When property has been sequestered the defendant shall have the right to retain possession of the same by delivering to the officer executing the writ his bond payable to the plaintiff with two or more good and sufficient sureties to be approved by such officer for an amount of money not less than double the value of the property replevied."

Article 4874 provides:

"If the property to be replevied as provided in the preceding article be personal property the condition of the bond shall be that the defendant will not remove the same out of the county, or that he will not waste, ill treat, injure, destroy, sell or dispose of the same according to the plaintiff's affidavit, and that he will have such property with the value of the fruits higher and revenue thereof forthcoming to abide the decision of the court, or that he will pay the value thereof, and of the fruits, hire, or revenue of the same, in case he shall be condemned so to do."

Article 4876 provides:

"The bond provided for in the three preceding articles shall be returned with the writ to the court from whence the writ was issued, and in case the suit is decided against the defendant, final judgment shall be entered against all the obligors in such bond jointly and severally for the value of the property replevied, and the value of the fruits, hire, revenue or rents thereof as the case may be."

Article 4877 provides:

"The defendant shall have the right at any time within ten days after the rendition of the judgment provided for in the preceding article to deliver to the sheriff, or constable of the court in which such judgment is rendered, the property or any portion thereof, which he has bound himself to have forthcoming to abide the decision of the court, and the sheriff or constable to whom such possession is tendered shall receive such property, &c."

In view of the right of the defendant to satisfy the judgment by return of the property, it was held in Cooke *vs.* Halsell, 65 Texas, 1, that the verdict and judgment should find the value of the several items of the property replevied.

Also in Watts *vs.* Overstreet, 78 Texas, 578, it was held:

"That the value of the property for which defendant and the sureties on his replevy bond may be liable is not the value at the time the petition or affidavit is filed, but at the time of the trial. In satisfaction of the judgment on the bond the property can be returned, and if only a part of it be returned then there shall be a credit on the judgment *pro tanto*."

To the same effect see Western Mortgage Co. *vs.* Shelton, 29 S. W. R., 494; also Hallert *vs.* San Saba, &c., 34 S. W. R., 637.

STATEMENT.

The plaintiffs in error, appellants below, assigned error in the State court as follows:

Tenth Assignment of Error.

The court below erred in rendering judgment herein against John M. Avery and his sureties on replevy bonds, Charles C. Cobb and H. I. Phillips, because the evidence as to the value of the property all fixed the value at the time the execution from the United States court was levied and

the property sold and the writs of sequestration executed, all of which was in June and July, 1893, and said evidence does not relate to the value at the time of this trial, in October, 1897, and the findings of the court as to the values are based on said evidence and fix the values on said former dates, and said evidence and findings furnish no legal basis on which to render said judgment against said John M. Avery and the sureties on his replevy bonds (Record, p. 51). The court of civil appeals, on question of value, found as follows, to wit:

"The evidence is sufficient to show the value of the property at the time of the trial, was as found by the trial court, and the value so found relates to that time, and not to the time the property was levied upon by the United States marshal, or when the writs of sequestration were issued" (Record, p. 59).

The defendants in error herein and appellees in the appellate court of Texas urged cross-assignments of error under the rules promulgated by the supreme court of Texas, all of which were sustained by the supreme court except cross-assignments of error No. 4, which the defendants in error in the nature of a cross-appeal now here assign as follows, to wit:

"The court erred in refusing to foreclose the lien of appellees, I. Popper & Bro. and R. R. Neyland & Co., on the 17 2-year-old steers and 32 2-year-old heifers, and in refusing to give appellees judgment against appellants; also for the value of said 17 head of steers and 32 head of heifers, their value being as follows, as found by the court, $534, together with 6% interest thereon" (Record, p. 92).

Proposition under Cross-assignments of Error.

The chattel mortgage executed by J. H. and M. E. Cooke to T. H. King to secure the note sued upon contained a sufficient description of the calves, being the 17 2-year-old

steers and the 32 2-year-old heifers, at the time of the trial, to entitle the defendants in error to a foreclosure of their lien as against the plaintiffs in error, the said mortgage being valid as between the original parties thereto and all those who claimed any privity with them who do not occupy a better position in law.

AUTHORITIES.

I respectfully refer the court to the authorities heretofore cited under counter-propositions, first assignment of error.

STATEMENT.

The mortgage described the property in question as follows:

"Also 50 head of cows with their spring calves, following the cows not over seven years old; cows branded Cooke on left side and O. K. on left hip and marked Swallow Fork in right ear, the over and under lid of left ear; calves to be marked and branded. All of said mules, colts, horses and mares are in pasture or at work on our farm at Payne's store, Hunt county, Texas, and all cows and calves are in pasture and are on range near Payne's store, Hunt county, Texas" (Record, p. 26).

This instrument is dated May 30, 1891.

The court of civil appeals found the value of the 17 2-year-old steers to be $12 per head, or $204, and the 32 2-year-old heifers at $10 per head, or $330, aggregating the sum of $534. The defendants in error herein pray, *first*, whether or not this court will take jurisdiction of this cost; *second*, if the court should hold that the record presents a question for its jurisdiction, then the defendants in error pray that the judgment of the supreme court of Texas be in all things affirmed, except as to that portion of its judgment wherein the court refused to sustain the fourth cross-

assignment of error, urged by the defendants in error, and in that respect the defendants in error pray of this court that judgment be rendered in their favor for the sum of $534, and 6 per cent. interest thereon in addition to the judgment rendered in their favor by the supreme court, and for such other and further relief in law or equity as they may be entitled to; and, as in duty bound, they will ever pray.

BENJ. F. LOONEY,
Attorney for Defendants in Error,
I. Popper & Bro. and R. R. Neyland.

Supreme Court of the United States.

No. 72.—October Term, 1900.

John M. Avery et al., Plaintiffs in Error, vs. Ignatz Popper et al. } In error to the Supreme Court of the State of Texas.

[December 3, 1900.]

This was an action originally instituted in the District Court of Hunt County, Texas, by Ignatz Popper and Edward Popper, (doing business under name of I. Popper & Brother,) to recover upon a certain promissory note executed May 26, 1891, by John H. Cooke and Mary E. Cooke, his wife, to Thomas H. King, for $1,940, and for the foreclosure of a chattel mortgage upon certain personal property hereinafter described, and (in their amended petition) also for a personal judgment against John M. Avery and his sureties upon certain replevin bonds.

An interest in the note to the amount of $775 was transferred by King, the payee, on April 10, 1892, to the firm of I. Popper & Brother, and the residue of such note and interest to Robert R. Neyland, under the name and style of R. R. Neyland & Company;

To secure the payment of such note John H. Cooke and wife, on May 26, 1891, executed and delivered to King a chattel mortgage upon fifty cows, with their calves of that spring, which cows were branded "Cook" on the left side and "O K" on the left hip, the calves not being branded; also one bay mare colt, one gray horse colt and one black mule colt. This instrument was legally filed and registered as a chattel mortgage on May 30, 1891;

On June 14, 1893, the marshal of the United States levied upon, among others, the above mentioned property, by virtue of an execution issued out of the Circuit Court of the United States at Dallas on June 8, 1893, upon a judgment rendered in favor of W. W. Avery against John H. Cooke and certain sureties upon a supersedeas bond, but not against his wife, Mary E. Cooke. This judgment was rendered in pursuance of the mandate of this court in *Cooke* v. *Avery*, (147 U. S. 375.) At the marshal's sale, which took place on June 28, 1893, the property was bid in by John M. Avery as attorney for and in the name of W. W. Avery, and all of such property was then and there delivered to John M. Avery;

On the following day, June 29, 1893, I. Popper & Brother brought this action in the District Court of Hunt County against John H. and Mary E. Cooke, W. W. Avery and John M. Avery, to recover of the

Cookes the amount of plaintiffs' interest in the note, ($775,) and to foreclose against all the defendants their mortgage upon the property described. On the same day R. R. Neyland & Company brought a separate suit against the same parties to recover the balance due on such note after deducting the amount due Popper & Brother, and likewise to foreclose the mortgage. These suits were consolidated January 16, 1894. The property was seized while in the possession of John M. Avery by virtue of writs of sequestration issued in these actions. After such seizure, John M. Avery replevied and resumed possession of the property, drove it out of Hunt County, and within a short time thereafter sold and disposed of it.

At the time the mortgage was executed to secure the note, there were many more animals of the same description mingled with those upon which the mortgage was given; but the State court found the evidence sufficient to show that, just prior to the execution of the mortgage, the animals embraced in it were pointed out to Mr. Neyland, who represented King in taking the mortgage security and drafting the mortgage. But the animals covered by the mortgage were not separated from the others of the same description with which they were mingled, nor was there any such separation when the execution in favor of Neyland was levied upon the property in controversy. The court further found that the fifty head of cows described in the mortgage, as well as all others of like description mingled with them, were the separate property of Mary E. Cooke at the time the mortgage was executed, and continued to be her separate property until disposed of by Avery; that the fifty calves were born during the marriage of Cooke and wife, after the cows became the separate property of Mrs. Cooke, and were, therefore, at the time the mortgage was given and the execution in favor of Avery levied, the community property of John H. and Mary E. Cooke. Also, that the horses and mule involved in this suit were the offspring of the separate property of Mary E. Cooke during her marriage with John H. Cooke, and were likewise the community property of Cooke and his wife at the time the mortgage was given and the execution levied.

The case appears to have been first tried in 1894, and judgment rendered against the plaintiffs in error; but on appeal by them the mortgage was held to be invalid, the judgment reversed, and the case remanded by the Court of Civil Appeals for a new trial. (*Avery* v. *Popper*, 34 S. W. Rep. 325.) The case was again tried in October, 1897, and resulted in a judgment in favor of Popper & Brother against John H. Cooke in the sum of $1,637 and in favor of Neyland, whose suit was consolidated with the other, in the sum of $1,974. The mortgage was foreclosed on the fifty cows, one mare, one horse and one mule, and a further judgment rendered against John M. Avery and the sureties upon his replevin bond in the sum of $850, the value of the property disposed of by him. The court further found

that as to the fifty calves the mortgage was invalid, and a foreclosure of the mortgage to that extent was denied.

The case was again carried to the Court of Civil Appeals by John M. Avery and his sureties, which affirmed the judgment against Cooke and wife, but increased the judgment against John M. Avery and his sureties in the sum of $534, the value of seventeen two-year old steers and thirty-two two-year old heifers. (45 S. W. Rep. 951.) The court found the District Court to have been in error in holding that the mortgage executed by the husband and wife was not a lien upon all the property embraced in it, whether separate or community. On appeal to the Supreme Court the judgments of the Court of Civil Appeals and of the District Court were reversed, and a judgment ordered in favor of Popper & Brother and Neyland against the plaintiff in error, John M. Avery, and his sureties in the sum of $850, interest and costs. (92 Tex. 337.) The court found that "no right attached under the mortgage to specific animals, nor did it give a lien upon an undivided interest in the herd. The power was given to sell certain cows and their calves, which could only be done by selecting them from the herd, and it being necessary to the execution of the express authority to sell, the law will imply the authority to take the fifty cows and calves from the larger number. (*Oxsheer* v. *Watt*, 91 Tex. 124.) The chattel mortgage was valid between the parties to it." "Upon default in payment, King or the holders of the note, had the right to select from John H. and Mary E. Cooke's stock of cattle and sell fifty cows and calves corresponding to the description in the mortgage. If the right had been exercised while the calves of the spring of 1891 were following their mothers, the selection of the cow would have identified the calf. But having failed to exercise the right until in the course of nature the dam and the young would separate, it has become impossible to identify the calves, and all claim upon them has failed, before Avery converted the stock."

Whereupon Avery and his sureties sued out a writ of error from this court.

Mr. Justice Brown delivered the opinion of the Court.

The plaintiffs in error invoke the jurisdiction of this court upon the ground stated in the third clause of R. S. section 709 of a "title, right, privilege or immunity claimed under . . . an authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed." The special right claimed was a right as purchaser under the marshal's sale upon execution to a priority of payment from the goods sold as against the chattel mortgage. The claim set up in the second assignment of error was that the mortgage was invalid as against such execution for the reason that there were many more

animals of the same description mingled with those upon which the mortgage was given, and that the animals covered by the mortgage were not separated from the others of the same description with which they were mingled, nor was there such separation up to the time said execution from the United States court was levied upon the property in controversy; that no lien attached to any particular animals in the herd, nor did the mortgage give a lien upon an undivided interest in the herd, and as a matter of law was invalid as against the execution; and that in giving priority to the mortgage the Supreme Court of Texas failed to give full force and effect to the judgment of the Circuit Court of the United States.

It should be borne in mind that this action was not begun until the day after the termination of the action in the Federal court by a sale of the property to Avery, the payment of the money, and apparently the return of the execution satisfied; and that the question litigated was not the legality of this particular judgment, which was admitted to be valid, but the general question whether, under the laws of Texas, an execution is valid as against a mortgage upon animals which are not identified, and not separated from others of the same description with which they are mingled. Briefly stated, the question is whether the mere fact that the plaintiff in error was a purchaser at a marshal's sale of the property, entitles him to bring into this court questions under the State law with respect to the validity and priority of a chattel mortgage covering the same property or a part thereof.

There are many authorities upon the general question of the rights of purchasers at marshals' sales as against lienholders under laws of the several States, from which the true rule may be deduced. The question is analagous to the one decided at the last term of this court in *Blackburn* v. *Portland Gold Mining Co.*, (175 U. S. 571,) and *De Lamar's Mining Co.* v. *Nesbit*, (177 U. S. 525,) to the effect that the mere fact that parties claim adversely to each other under the mining laws or under patents of the United States do not entitle them to a writ of error from this court, unless there be a question made as to the meaning and construction of a Federal statute, or of an authority exercised under the United States.

Of the cases bearing more directly upon the question here involved of the relations of a purchaser under a marshal's sale to others claiming the same property, the earliest is that of *Collier* v. *Stanbrough*, (6 How. 14.) Collier was the purchaser under a marshal's sale upon execution against one David Stanbrough of certain personal property which was claimed by Josiah Stanbrough, the defendant, who insisted that the property was not legally seized or levied upon, and that it was not legally appraised or advertised as required by law. Jurisdiction under the writ of error to the Supreme Court of Louisiana was sustained upon the obvious ground that the sale by the marshal was directly attacked, and the invalidity of plaintiff's title set up as a defense.

In *Erwin* v. *Lowry*, (7 How. 172,) Erwin was the purchaser at a marshal's sale of certain land and negroes, and was sued by Lowry, who claimed as curator of the estate to which the property belonged. The question was the same as that in *Collier* v. *Stanbrough*, namely, whether the marshal's deed to Erwin was void for the reason that it was not supported by a lawful judgment, or for want of compliance with any legal requirement in conducting the seizure and sale. The jurisdiction was also sustained in this case.

In *Clements* v. *Berry*, (11 How. 398,) the suit was by Daniel Berry against the marshal directly, in replevin, to recover property levied upon as the property of Charles F. Berry, and the sale was stopped by a writ of replevin issued from the State court. As the marshal was a party defendant to the suit, and his right to sell the property was directly attacked, the jurisdiction was sustained. For the same reason that the marshal was made a defendant to the suit in the State court, and justified under process from the Federal court, jurisdiction was sustained in *Freeman* v. *Howe*, (24 How. 450;) *Buck* v. *Colbath*, (3 Wall. 334;) *Etheridge* v. *Sperry*, (139 U. S. 266;) and *Bock* v. *Perkins*, (139 U. S. 628.)

In *Day* v. *Gallup*, (2 Wall. 97,) the suit was by Gallup against Derby and Day, execution creditors, Allis, their attorney, and Gear, marshal of the United States, who justified under a judgment of the Federal court against one Griggs. The suit was discontinued as to the marshal before trial. The case turned on the ownership of the goods seized, and judgment went against Derby and Day, which was affirmed by the Supreme Court of Minnesota. The suit was not begun until after the execution from the Federal court had been returned and the action completely terminated. Upon writ of error from this court it was held that at the time Gallup brought his action there was no case pending in the Federal court respecting the goods which had been attached under process from that court; that it did not appear that the authority of Gear as marshal to take the goods was drawn in question, and that from the return of the execution satisfied the Federal court had no control over the parties. The case between the plaintiffs in error against Griggs, the original defendant in the Federal court, had been decided, the money made on the execution and the debt paid. In commenting on that case in *Buck* v. *Colbath*, (p. 342,) it was said: "It is only while the property is in possession of the court, either actually or constructively, that the court is bound or professes to protect that possession from the processes of other courts. Whenever the litigation is ended, or the possession of the officer or court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not."

We do not undertake to say that the mere fact the action in the Federal court is no longer pending would oust the jurisdiction of this court to

re-examine the action of the State court, if the validity of the judgment of the Federal court, or the proceedings by the marshal under that judgment were directly attacked; but in *Day* v. *Gallup* it appeared that not only had the proceedings in the Federal court terminated, but that the real question was the ownership of the goods as between the attaching creditors and Gallup. Gallup claimed under a sale of the goods which the attaching creditors insisted was a fraud.

In *Dupasseur* v. *Rochereau*, (21 Wall. 130,) Rochereau, a judgment creditor of one Sauvé, brought an action in the State court against Dupasseur, alleging that he had taken possession of a plantation belonging to Sauvé upon which he, Rochereau, held a mortgage, and charging that the plantation was bound for the debt, and that Dupasseur was bound either to pay the debt or give up the plantation. Dupasseur defended upon the ground that he had bought the property at a marshal's sale, upon an execution in his own favor against Sauvé, "free of all mortgages and encumbrances, and especially from the alleged mortgage of the plaintiff," Rochereau. Upon writ of error from this court it was held that, as the question at issue was the effect to be given to the judgment of the Federal court and to the proceedings under the execution in that court, and to the sale by the marshal free of all mortgages and encumbrances, jurisdiction should be sustained. Here the validity of the sale by the marshal was directly attacked. Notwithstanding the fact that Dupasseur purchased the property under the execution sale on May 5, 1876, and Rochereau did not begin his action until June 7, 1866, the jurisdiction was sustained, because Dupasseur's title under that purchase was attacked by the other party.

In *McKenna* v. *Simpson*, (129 U. S. 506,) an assignee in bankruptcy resorted to a State court to set aside a conveyance by the bankrupt as in fraud of creditors; but as no question was raised there as to the power of the assignee under the acts of Congress, or as to the rights vested in him as assignee, but only as to what should be deemed a fraudulent conveyance and as to the application of the evidence in reaching that decision, we held that the case presented no Federal question, and the writ of error was dismissed.

Per contra, in *O'Brien* v. *Weld*, (92 U. S. 81,) the question arose whether, under the bankrupt law, the District Court had authority to make a certain order, and as the decision of the State court was against such authority, jurisdiction was sustained. Such was also the case in *Factors' Insurance Co.* v. *Murphy*, (111 U. S. 738,) where the effect to be given to a sale of property under an order of a District Court was in question, the authority of the court to direct a sale free from encumbrances being denied.

In *Stanley* v. *Schwalby*, (162 U. S. 255,) the action in the State court was directly against officers of the United States, and ultimately against the Government itself. Jurisdiction was sustained upon that ground.

Finally, in *Pittsburg &c. R. R.* v. *Loan & Trust Co.*, (172 U. S. 493,) the question arose whether due effect was accorded to certain foreclosure proceedings in Circuit Courts of the United States, under which plaintiff in error claimed title to the land and property in question. Under these proceedings a sale of railroad property had been made, subject to certain outstanding bonds prior in lien to the mortgage and to all other, if any, paramount liens thereon, and that the decree should not in any manner prejudice or preclude the holders of such paramount liens. Plaintiff in error contended that the State court did not give due effect to these decrees of the Circuit Courts of the United States, in that it did not recognize as paramount the rights acquired under those decrees by the purchasers of the property in question; but postponed or subordinated these rights to a lien upon such property, which, it was alleged, was created or attempted to be created while those suits were pending, and while the property was in the actual custody of those courts, by receivers, for the purposes of being administered. As the question concerned the effect to be given to a sale under process from the Federal courts, and to the construction of the decree of those courts, jurisdiction was sustained.

With respect to writs of error from this court to judgments of State courts in actions between purchasers under judicial proceedings in the Federal courts and parties making adverse claims to the property sold, the true rule to be deduced from these authorities is this: That the writ will lie, if the validity or construction of the judgment of the Federal court, or the regularity of the proceedings under the execution, are assailed; but if it be admitted that the judgment was valid, and these proceedings were regular, that the purchaser took the title of the defendant in the execution, and the issue relates to the title to the property, as between the defendant in the execution or the purchaser under it, and the party making the adverse claim, no Federal question is presented—in other words, it must appear that the decision was made against a right claimed under Federal *authority*, in the language of R. S. § 709.

Applying this test to the case under consideration, it is evident from the record that no question was made as to the validity of the judgment, or the regularity of the proceedings in the Federal court; and that the case turned upon the question whether, under the laws of Texas, a chattel mortgage upon property sold under execution is good which does not identify the particular property covered by it, but leaves such property to be subsequently identified by selection of the mortgagor. In regard to this, the Supreme Court of that State held (92 Tex. 337) that the chattel mortgage upon the fifty cows with their calves, out of a designated herd of one hundred, with power to the mortgagee to sell on default, gave him the right to select such cows from the larger number; and that such mortgage, implying, as it did, a power of selection on the part of the mortgagee, was, when duly

registered, notice of his rights to the purchaser of the mortgagor's interest—following in these particulars *Oxsheer* v. *Watt*, (91 Tex. 124.) That this was no new doctrine in the State of Texas is also evident from the case of *Elliott* v. *Long*, (77 Tex. 467,) decided in 1890, three years before the property was sold upon execution in this case. See also *Wofford* v. *McKenna*, (23 Tex. 46.) We are referred to two cases which apparently conflict with these, (*Cleveland* v. *Williams*, 29 Tex. 212, and *Moss* v. *Sanger*, 12 S. W. Rep. 616,) but if any such conflict existed, it was for the Supreme Court to settle it, as it seems to have done in *Elliott* v. *Long*, by overruling the former cases. Whether the right of selection recognized as between mortgagor and mortgagee is also applicable as between a purchaser upon execution and the mortgagee, is not a Federal question, if no discrimination be made against executions from Federal courts.

This was a question either of local law or of general law. If of local law, of course the decision of the Supreme Court of Texas is binding upon us. If of general law, as it involves no Federal element, it is equally binding in this proceeding, since only Federal rights are capable of being raised upon writs of error to State courts. Conceding that, if the question had arisen on appeal from a Circuit Court of the United States, we might have come to a different conclusion, it by no means follows that we can do so upon writ of error to a State court, whose opinion upon a question of general law is not reviewable here.

Other questions are raised in the assignments of error, but they bear even more remotely upon a Federal right. The decision already made covers them.

The writ of error must therefore be

Dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.